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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, DELAWARE & HUDSON RAILROAD CORPORATION, ET AL., PETITIONERS,

vs.

ACME FAST FREIGHT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under Rule XV (b)	1	1
Record from D. C. U. S., Southern New York	3	2
Amended complaint	3	2
Stipulation re: complaint	8	6
Amended answer of defendant, The Delaware, Lackawanna and Western Railroad Co., typical	10	7
Exhibit "A"—Uniform straight bill of lading	24	17
Exhibit "B"—Shipping order	26	19
Answer of defendant, Pennsylvania Railroad Co. as typical	28	21
Exhibit "A"—Uniform straight bill of lading	42	31
Exhibit "B"—Shipping order	44	33
Exhibit "C"—Rules 1, 7 and 14	46	35
Plaintiff's interrogatories	48	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 21, 1948.

Record from D. C. U. S., Southern New York—Continued		Page
Answer to interrogatories of Wabash R. R. Co. as typical	50	38
Exhibit 1—Uniform bill of lading, shipping order and memorandum	52	39
Plaintiff's notice of motion for summary judgment	54	47
Affidavit of William J. H. McEntee, read in support of motion	55	47
Opinion by Freight Claim Division	58	50
Notice of motion by D., L. & W. R. R. Co. and C., M., St. Paul & Pac. R. R. Co. for judgment on the pleadings	71	60
Plaintiff's notice of motion to strike defenses	72	60
Answering affidavit of B. H. Wattlaufer, read in opposition to plaintiff's motion	73	61
Stipulation extending pleadings to include defendant, Wabash Railroad Co.	78	65
Answering affidavit of H. W. Kerns, read in opposition to plaintiff's motions	79	66
Answering affidavit of William C. Morrow, read in opposition to plaintiff's motion	80	66
Stipulation amending notice of motion for judgment on the pleadings, etc.	81	67
Opinion, Bright, J.	83	69
Order, dated June 3, 1947, appealed from	103	85
Judgment, dated July 10, 1947, appealed from	108	88
Notice of appeal	109	89
Designation by plaintiff-appellant	110	90
Statements of points on appeal	112	91
Designation of additional portions of the record, proceedings and evidence by defendant-appellees	114	92
Stipulation as to transcript of record	117	94
Clerk's certificate (omitted in printing)	118	
Opinion, Frank, J.	119	95
Judgment	130	106
Clerk's certificate (omitted in printing)	132	
Order allowing certiorari	133	109

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Index No. Civil 35-395

ACME FAST FREIGHT, INC., Plaintiff,

against

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; Delaware & Hudson Railroad Corporation; Delaware, Lackawanna & Western Railroad Company; Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company; Pennsylvania Railroad Company; and Wabash Railroad Company, Defendants

STATEMENT UNDER RULE XV(b)

This action was commenced by the filing of a complaint June 17, 1946, in which the plaintiff and the defendants, Delaware, Lackawanna and Western Railroad Company and Western Railroad Company and Delaware & Hudson Railroad Corporation were the original parties. An amended complaint naming the defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Pennsylvania Railroad Company, Wabash Railroad Company and Loftin and Martin as trustees of the Florida East Coast Railroad Company was filed June 22, 1946.

Answers of the defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Delaware, Lackawanna & Western Railroad Company and Wabash Railroad Company were served and filed August 14, 1946. Amended answers of said defendants, and answers of the other defendants were served and filed August 20, 1946. The complaint was [fol. 2] amended by stipulation and order dated September 10, 1946. Plaintiff moved herein for summary judgment against defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company by notice of motion dated August 16, 1946, and moved herein for an order striking out the defenses of all defendants by notice of motion dated August 21, 1946, and stipulation dated August 26, 1946. Defendants, Delaware, Lackawanna & Western Railroad

Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company moved for an order granting judgment on the pleadings in favor of said defendants by notice of motion dated August 20, 1946, which notice of motion was extended *nunc pro tunc* to include all defendants by stipulation dated May 19, 1947.

Argument of said motions was had before Judge Bright August 27, 1946; an opinion rendered thereon April 3, 1947, an order entered thereon June 3, 1947, a judgment entered on said order July 10, 1947, and notice of appeal filed July 15, 1947.

[fol. 3] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

ACME FAST FREIGHT, INC., Plaintiff,

against

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; Delaware & Hudson Railroad Corporation; Delaware, Lackawanna & Western Railroad Company; Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company; Pennsylvania Railroad Company; and Wabash Railroad Company, Defendants

AMENDED COMPLAINT

Plaintiff alleges:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware and is a freight forwarder in interstate commerce subject to Part IV of the Act to Regulate Commerce.

2. The Corporate defendants are each of them rail carriers in interstate commerce subject to Part I of the Act to Regulate Commerce.

3. Defendants, Loftin and Martin are Trustees, appointed in proceedings in the District Court of the United States for the Southern District of Florida, of the properties of the Florida East Coast Railway Company, a rail carrier in interstate commerce subject to Part I of the Act to Regulate Commerce.

[fol. 4] 4. Defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, is a Wisconsin corporation.

5. Defendant, Delaware & Hudson Railroad Corporation, is a New York corporation.

6. Defendant, Delaware, Lackawanna & Western Railroad Company, is a Pennsylvania corporation.

7. Defendant, Pennsylvania Railroad Company, is a Pennsylvania corporation.

8. Defendant, Wabash Railroad Company, is an Indiana corporation.

9. This action arises under various provisions of the Act to Regulate Commerce, of which this Court is given original jurisdiction by the provisions of the Judicial Code, 21 U. S. Code §41(8).

10. The business of plaintiff as freight forwarder consists principally of receiving at its various stations, or assembling by motor truck, numerous less-than-carload shipments of various shippers and consignees, combining them in rail carloads for various destinations, and at the termination of rail transit of such cars effecting truck delivery to the individual consignees thereof, making a single charge to the shipper or consignee for the combined transportation. No part of the transportation service rendered by plaintiff is effected by vehicles owned or physically controlled by plaintiff.

11. At all times herein and for many years prior to the enactment of Part IV of the Interstate Commerce Act the uniform bill of lading issued by rail carriers provided among other things as follows:

> "Sec. 2(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivery carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or [fol. 5] delay occurred, or carrier in possession of the property when the loss, damage, injury or delay occurred, within nine months after delivery of the property * * * or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. * * *"

Plaintiff has at all times issued bills of lading with like terms and conditions to shippers tendering freight for transportation by its agency, and has duly filed and published the same as its tariff bill of lading terms and conditions.

12. The occurrence of losses and damage to shipments through the agency of the plaintiff while said shipments are physically in the possession of defendants and other rail carriers is constant and numerous. In those instances it is the practice of the parties, and other rail carriers employed by plaintiff, for the plaintiff to accept claims, with supporting data, from the individual shippers or consignees, and to forward them as a claim upon the rail carrier responsible for such loss or damage.

13. At all times stated herein the Interstate Commerce Act, 49 U. S. Code § 20 (11), provided in substance that any common carrier subject thereto should issue a receipt or bill of lading for property received for transportation, and should be liable to the lawful holder thereof for any loss, damage or injury to such property whether occurring in its hands or in the hands of any connecting carrier; and provided further, 49 U. S. Code § 20(12) that the common carrier, railroad, or transportation company issuing such receipt or bill of lading should be entitled to recover from the common carrier, railroad, or transportation company on whose lines the loss, damage or injury shall have been sustained, the amount it might be required to pay the owner [fol. 6] of said property, as might be evidenced by any receipt, judgment, or transcript thereof.

14. It has been the uniform and long continued construction of defendants and other rail carriers that recovery by an initial carrier against a connecting carrier responsible for a loss does not require any written notice of claim at any time, so long as claim has been filed within nine months on one of the carriers specified in the bill of lading, and the statute does not provide for any such re-notice.

15. In the enactment of Part IV of the Interstate Commerce Act it was provided among other things, 49 U. S. Code 1013, that the foregoing provisions, commonly known as the Carmack Amendment, shall apply with respect to freight forwarders, in the case of service subject to that

chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purpose of such sections.

16. Numerous instances have arisen since the effective date of said Part IV of the Interstate Commerce Act, in which written claim for loss or damage for which defendants and other rail carriers are responsible, has been duly filed with plaintiff within nine months, but in regard to which claim papers or notice of claim has not been forwarded to defendants or other rail carrier within nine months. Defendants and certain other rail carriers have in all such instances refused to honor such claims, or to reimburse plaintiff for the amounts it has been obliged to pay to the owners of shipments so lost or damaged or the lawful holders of plaintiff's bills of lading.

17. The individual amounts of such losses are usually small and frequently do not warrant the expense of legal [fol. 7] action thereon. Suits in regard thereto have been usually in courts of limited and inferior jurisdiction, the decisions of which have slight value as precedents for other courts. Litigation of individual claims in which this issue is the sole or principal defense would necessitate actions to be conducted in many different jurisdictions. The aggregate amount of such claims is large and the question is one which continues and will continue to recur and the defendants have refused and continue to refuse to entertain or pay such losses to plaintiff without authoritative ruling of court thereon.

Wherefore, plaintiff prays judgment for a declaration that plaintiff as such forwarder is receiving carrier within the meaning of the uniform bill of lading, that written notice of claim to plaintiff within the period of nine months therein provided satisfies the meaning and purpose of said provisions, and that after receipt of such written notice of claim, plaintiff, by subrogation to the claims of shippers sustaining loss or damage in the transportation service of defendants as plaintiff's connecting carriers, is entitled to recover from defendants the amounts which it has been obliged to pay such shippers; and for such other and further

relief as may be just, together with the costs and disbursements of this action.

Clark, Carr & Ellis, Attorneys for Plaintiff, 120 Broadway, New York City 5, by Paul A. Crouch, of Counsel.

[fol. 8] In District Court of the United States

Stipulation Re: Complaint

It is stipulated that Paragraph 17 of the Complaint be and it is hereby amended to read as follows:

"The individual amounts of such losses are usually small and frequently do not warrant the expense of legal action thereon. Suits in regard thereto have been usually in courts of limited and inferior jurisdiction, the decisions of which have slight value as precedents for other courts. Litigation of individual claims in which this issue is the sole or principal defense would necessitate actions to be conducted in many different jurisdictions. The aggregate amount of such claims is large and the question is one which continues and will continue to recur, and the defendants have refused and continue to refuse to entertain or pay such losses to plaintiff without authoritative ruling of court thereon."

Dated: September 6, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff; Rowland L. Davis, Jr., per J.F.R., Attorney for Defendants, Lackawanna and Milwaukee Railroads. [fol. 9] Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company. Bleakley Platt & Walker, Attorneys for Defendant, Pennsylvania Railroad Company. Thomas L. Ennis, Attorney for Defendant, Delaware & Hudson Railroad Corp. Bleakley Platt & Walker, Attorneys for Defendants, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company.

So ordered 9/10/46. Samuel Mandelbaum, U. S. D. J.

[fol. 10] IN DISTRICT COURT OF THE UNITED STATES

AMENDED ANSWER OF DEFENDANT, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO., TYPICAL

The defendant, The Delaware, Lackawanna and Western Railroad Company, for an amended answer to the amended complaint herein alleges as follows:

First. Admits the allegations contained in paragraphs designated "1," "2," "3," "4," "5," "6," "7," "8" and "9" of the amended complaint herein except that as to the United States Code reference in paragraph numbered and designated "9" of the amended complaint this defendant states that the correct reference is 28 U. S. Code § 41 (8).

Second. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "10" except that this defendant admits that the business of plaintiff as a freight forwarder subject to the provisions of Part IV of the Interstate Commerce Act consists principally of receiving for reshipment various individual less-than-carload shipments of merchandise from various owners, shippers and consignees, assemblying some in carlot quantities which in some instances are shipped by plaintiff in railroad carload quantity by railroad carriers to various destinations at the termination of which rail transit plaintiff makes delivery of each individual shipment to the consignee thereof directly or where truck delivery is necessary by highway motor common carrier, as the circumstances of such business and practice of plaintiff are specifically and [fol. 11] more fully set forth hereinafter in the "First" separate, independent and complete defense of this defendant in this answer.

Third. In answer to paragraph of the amended complaint herein numbered and designated as "1" this defendant for the purposes of accuracy refers to the form, terms and conditions of the Uniform Bill of Lading in effect prescribed by the Interstate Commerce Act for issuance to shippers by this defendant upon freight shipments received by this defendant and other railroad common carriers for transportation and which has been published by this defendant and filed with the Interstate Commerce Commission, copy of which said Uniform Bill of Lading is attached to this

answer as Exhibit "A" and made a part hereof to the same extent as if specifically set forth herein; and further that this defendant denies any knowledge or information sufficient to form a belief as to the practices of plaintiff under all circumstances as to issuance of bill of lading in the transportation which it performs or in which it participates and as to the terms, provisions and conditions of any such bill of lading issued by the plaintiff this defendant refers to the bill of lading, if any, published by plaintiff and filed with the Interstate Commerce Commission.

Fourth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "12" except that this defendant admits during the regular course of transportation of carload shipments made by the plaintiff over the railroad of this defendant claim for damage or injury to some such carload shipments is made by plaintiff and that claim for said damage or injury when so made is made in writing by plaintiff and in plaintiff's name and in [fol. 12] its behalf as shipper or consignee and that plaintiff sometimes affixes supporting documents to such claim when so made.

Fifth: Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "13" and "15" and begs leave to refer on the trial to the specific provisions of the Interstate Commerce Act, Title 49 U.S.C.A. §§ 20 (11), 20 (12) and 1013.

Sixth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "14" and alleges that the uniform and long continued construction of this defendant and substantially all other rail carriers subject to Part I of the Interstate Commerce Act of § 20 (12) of said Act has been that the right-over provided for in said section is subject to modification, regulation or limitation by contract, arrangement or agreement between the receiving or delivering carrier by railroad and the rail carrier upon whose lines the loss, damage or injury may have occurred when such rail carriers are subject to Part I of said Act; and further alleges that this defendant and other rail carriers subject to Part I of said Act have agreed

to settle loss and damage freight claim liability among themselves, to make payments and provide for reimbursement therefor among themselves in accordance with an agreement to that effect entitled "Principles and Practices" and "Freight Claim Rules" of the Association of American Railroads.

Seventh. Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "16" and "17" and not hereinbefore expressly admitted except that it admits that unless claim in writing for loss, damage or injury to a shipment transported by this defend-[fol. 13] ant, is filed with this defendant or a connecting rail common carrier by the lawful holder of the bill of lading in accordance with the contract terms and conditions of the Uniform Bill of Lading, this defendant, pursuant to its duties and obligations to the shipping public as provided for in Part I of the Interstate Commerce Act and all provisions thereof and laws supplemental and auxiliary thereto, refuses to make payments on said claim and denies and disallows same; and this defendant further admits and expressly asserts that it applies and enforces the bill of lading terms and conditions with respect to filing of claim by plaintiff as a shipper and consignee of shipments made by it without discrimination or preference the same as it applies and enforces the same with respect to any other shipper or consignee using railroad common carrier services.

For a First, Separate, Independent and Complete Defense to the Alleged Cause of Action Set Forth in the Complaint Herein This Defendant Alleges, Upon Information and Belief as Follows:

Eighth. The business of plaintiff as a freight forwarder subject to Part IV of the Interstate Commerce Act consists in part of holding itself out to provide transportation of property in Interstate Commerce and, in the ordinary and usual course of its undertaking, of (A) assembling and consolidating or providing for assembling and consolidating shipments of such property and performing or providing for the performance of break-bulk and distributing operations with respect to such consolidated shipments as hereinafter more fully alleged, and (B) assuming responsibility for the transportation of such property from point of receipt

to point of destination, and (C) utilizing for the whole or [fol. 14] part of the transportation of such shipments the services of a carrier or carriers subject to Part I, II or III of the Interstate Commerce Act.

Ninth. In the course of such business plaintiff receives at various assembly points numerous individual less-than-carload or less-than-truckload shipments of freight which have been delivered at said assembly points by vehicles of the consignors or of local draymen, or of a highway motor common carrier pursuant to a tariff in the publication and filing of which with the Interstate Commerce Commission said highway motor common carrier and the plaintiff have joined. Such tariff provides for a joint rate and through route as between them for the entire through transportation from origin to ultimate destination of each such shipment. Plaintiff and such highway motor common carriers are authorized and permitted to join in such tariff by the provisions of the Interstate Commerce Act, Part II and Part IV thereof. A bill of lading is issued to the consignor of each of such shipments by plaintiff by a local drayman acting as plaintiff's agent, or by the highway motor common carrier, for the through transportation to the ultimate consignee named therein, wherein plaintiff assumes responsibility for the transportation of such property from the point of receipt from such consignor to the time and place of ultimate delivery to the consignee named in such bill of lading.

Tenth. At said assembly points said individual less-than-carload shipments are sorted, and assembled and consolidated by plaintiff into either trucklot quantities for further highway transportation or railroad carlot quantities for rail transportation. The carlot quantities are then tendered to and delivered to this defendant as new, original, single carload shipments of mixed merchandise for trans- [fol. 15] portation by this defendant and its connecting rail carriers, when such are necessary, pursuant to the terms of the Uniform Rail Bill of Lading, and are consigned to the plaintiff at designated rail tariff destinations on the lines of this defendant or said connecting rail carriers and for delivery as single carload shipments to this plaintiff at said respective designated rail tariff destinations. Said carload shipments are not consigned to the consignees or destinations name in plaintiff's or the highway motor common carrier's individual bills of lading previously issued as

aforesaid for the component parts of said carload shipments. The tender and consigning referred to in this paragraph is effected by means of a "Shipping order," a copy of which is annexed hereto marked Exhibit B. The said shipments are not tendered to this defendant for transportation upon a through route, if any, specified in the bills of lading previously issued by plaintiff upon said less-than-carload shipments or on the component parts of said carload shipments as aforesaid, but are tendered for rail transportation to a rail destination upon a route specifying only defendant or its aforesaid connecting railcarriers. There is no rail routing specified or described in the bills of lading issued by plaintiff or by a highway motor common carrier as aforesaid.

Eleventh. Upon each of said carload shipments tendered and delivered by plaintiff to this defendant as aforesaid this defendant issues a bill of lading, prescribed for use by rail carrier by the Interstate Commerce Commission, which bill of lading shows the plaintiff to be shipper or consignor and also shows the plaintiff to be consignee thereon and describes the shipment as a mixed "carload" of miscellaneous merchandise. Such bill of lading recites a rail tariff destination on the line of defendant or connecting rail car-
[fol. 16] riers to which the carload is to be transported as aforesaid. Such bill of lading does not show as consignor or as consignee any of the persons shown as consignors or as consignees in the several bills of lading previously issued as aforesaid by the plaintiff or the highway motor common carrier upon component parts of said carload shipments; and such bill of lading does not recite as the destination of the carload shipment the several destinations recited in the aforesaid bills of lading previously issued by plaintiff or said highway motor common carrier upon the component parts of said shipments; and said rail bill of lading provides solely for and is effective solely for the railroad transportation of said carload shipment from the point received by the rail carrier to the destination named in said rail bill of lading.

Twelfth. Said railroad transportation of the aforesaid carload shipments is performed solely pursuant to the railroad classification, tariffs, exceptions and supplements thereto duly published and filed with the Interstate Commerce Commission and applicable to the transportation per-

formed by this defendant and connecting rail carriers for all shippers of freight alike, and not solely applicable to forwarders under Part IV of the Interstate Commerce Act, and which particularly include, among others, Rules 1, 7 and 14, a true copy of each of which said rules will be produced, exhibited and offered in evidence at the trial of this action, and also pursuant to the terms and conditions of said Uniform Rail Bill of Lading, Exhibit A annexed hereto. Said classification, tariffs, exceptions and supplements thereto provide for joint rates and through routes in the rail transportation from the points the carload shipments are received by the rail carriers to the rail destinations as between initial, connecting and delivering rail carriers, but do not provide for joint rates or through routes as between [fol. 17] any rail carrier or carriers on the one hand and forwarders subject to Part IV of the Interstate Commerce Act and specifically plaintiff in this action on the other.

Thirteenth. At termination of said rail transportation, said carload shipments are delivered by this defendant or its connecting rail carrier to plaintiff at the rail destinations pursuant to plaintiff's aforesaid tender and recited in the aforesaid rail bill of lading issued to plaintiff upon said carload shipments as aforesaid.

Fourteenth. Subsequent to delivery to the plaintiff at rail destinations by this defendant or its connecting rail carriers of said carload shipments, this plaintiff breaks up and sorts said carload shipments into the separate units existing prior to assembly thereof by plaintiff at its aforementioned assembly points and delivers each of said units to vehicles of the ultimate consignees named in the bills of lading issued by plaintiff or by the original highway motor common carrier, or to vehicles of a highway motor common carrier for further transportation and ultimate delivery to each respective consignee thereof, pursuant to filed and published tariff, or to vehicles of local draymen; or said shipments so broken up are again assembled and consolidated into truckloads for further transportation by highway motor common carrier pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff prior to ultimate breaking up and delivery to each respective consignee or said shipments so broken up are again assembled and consolidated in new, separate, carlot ship-

ments for further transportation by rail carrier on new rail carload bills of lading pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff [fol. 18] prior to ultimate breaking up and delivery to each respective consignee.

Fifteenth. For the transportation of said carload shipments by defendant and its connecting rail carriers, as aforesaid, plaintiff is obligated to pay, and for its own account does pay to defendant by prepayment at time of tender of said carload shipments by plaintiff to defendant or at time of delivery to plaintiff as consignee by defendant of said carload shipments as prescribed by Part I of the Interstate Commerce Act, full tariff railroad transportation charges based on carload rates for transportation of said carload shipments pursuant to the terms and conditions of the said Uniform Rail Bill of Lading. Said charges are considerably less in amount than the aggregate charges would be if each of the individual units comprising said carload were shipped over defendant's rail lines and that of its said connecting rail common carriers as a less-than-carload shipment, all of which is pursuant to classification, tariffs, exceptions and supplements thereto published and filed with the Interstate Commerce Commission by this defendant and connecting railroad carriers participating therein and applicable to such transportation and service when such rail service is used, and to which said classification, tariffs, exceptions and supplements plaintiff is not a party. Plaintiff does not pay to the defendant the ten per cent additional tariff charges provided for in Rule 1 of the aforesaid Classification hereinabove referred to.

Sixteenth. For the services performed by plaintiff for the original consignor or shipper to whom plaintiff or a participating highway motor common carrier has issued a bill of lading, as aforesaid, plaintiff collects a charge pursuant to filed and published tariff, based upon plaintiff's less-than-carload rate for the shipment covered by each [fol. 19] such bill of lading for the service performed by plaintiff pursuant to Part IV of the Interstate Commerce Act; and said tariff charge is divided and apportioned between plaintiff and the highway motor common carrier participating, when the services of such highway motor common carrier are utilized by plaintiff, in accordance with an

agreement for such division and apportionment. Neither this defendant nor any of its connecting rail carriers receives from plaintiff said charge, or any part thereof, nor does it or any of them participate in any division or apportionment of said charge.

Seventeenth. There is no authorization or permission in the Interstate Commerce Act or any other law permitting this defendant or any railroad as a railroad common carrier to enter into any agreement with plaintiff to perform transportation services under a joint rate or through route or to engage in any practice different from this defendant's or any railroad common carrier's published and filed tariffs, classification, exceptions and supplements thereto, or to engage in any practice different from that accorded all other shippers or receivers of freight shipments transported over this defendant's railroad or any railroad common carrier.

Eighteenth. The bills of lading issued by plaintiff as forwarder under Part IV of the Interstate Commerce Act, or by a highway motor common carrier, as aforesaid, on the individual less-than-carload shipments, as aforesaid, are not in fact issued on the same form, and do not in fact contain all of the same terms and conditions, as the aforesaid uniform bill of lading prescribed by the Interstate Commerce Commission for use by rail carriers subject to Part I of the Interstate Commerce Act, and such bills of lading issued by plaintiff and such highway motor common carriers [fol. 20] may be varied as to form, terms and conditions by filing new forms, terms and conditions with the Interstate Commerce Commission.

Nineteenth. Neither the carload shipments nor any of the component parts thereof are received by defendant or other common carriers by rail from plaintiff, as hereinbefore alleged, for transportation pursuant to the terms and conditions of the bills of lading previously issued by plaintiff to other persons upon component parts thereof, but are received for transportation pursuant to the terms and conditions of the bills of lading issued by this defendant, and also pursuant to the published and filed classification, tariffs, exceptions and supplements thereto of this defendant and its connecting rail common carriers, in which classification the uniform bill of lading issued by the defendant is incorporated.

Twentieth. With respect to carload shipments of the character hereinabove set forth received by this defendant as delivering rail carrier from any connecting rail carrier for delivery to plaintiff, the same practice and course of dealing are in effect as with respect to shipments received by this defendant from plaintiff as hereinbefore alleged.

Twenty-first. The business, practice, course of dealings, classifications, tariffs, exceptions and supplements thereto and uniform rail bill of lading hereinbefore referred to in paragraphs "Eighth" to "Twentieth," both inclusive, of this amended answer as now being carried on and in effect, were carried on and in effect in substantially the same manner during all times referred to in the complaint, and since the enactment of Part IV of the Interstate Commerce Act, and for many years prior thereto, except that prior to enactment of said Part IV plaintiff had no obligation in law [fol. 21] to publish and file with the Interstate Commerce Commission its classification and tariffs, or to abide thereby.

Twenty-second. Claims have been filed by this plaintiff against this defendant for loss, damage, injury or delay occurring on the line of this defendant or its connecting rail carriers to shipments, received from or delivered to this plaintiff by this defendant as aforesaid. It has been the uniform practice of plaintiff to file such claims as shipper or consignee of such shipments, and plaintiff has never supported such claims by evidence of any judgment or transcript thereof procured against it or by evidence of any receipt for sums paid out by it. Payment of such claim by this defendant would constitute a preference or advantage to plaintiff over other shippers, in violation of the Interstate Commerce Act.

Twenty-third. By reason of the foregoing any and all liability of this defendant to plaintiff for loss, damage, injury or delay occurring on the line of this defendant or its connecting carriers as aforesaid to the shipments received from or delivered to plaintiff as aforesaid is measured by the terms and conditions of said Uniform Rail Bill of Lading (Exhibit A hereto), and the aforesaid classifications, tariffs, exceptions and supplements thereto. As a condition precedent to recovery for any such loss, damage, injury or delay, the plaintiff must comply with the provision in Section 2(b) in the said Uniform Rail Bill of Lading, providing for the

filing of claim; independently of said Uniform Rail Bill of Lading the plaintiff has no right of action against this defendant, and has no right of action against this defendant under any bill of lading issued by plaintiff or a highway motor common carrier to any person as aforesaid.

[fol. 22] For a Second, Separate, Independent and Complete Defense to the Alleged Cause of Action Set Forth in the Complaint Herein This Defendant Alleges, Upon Information and Belief as Follows:

Twenty-fourth. This defendant repeats, reiterates and realleges each and every allegation and averment contained in paragraphs of this amended answer numbered and designated as "Eighth" to "Twenty-second," both inclusive, with the same force and effect as if herein specifically set forth at length.

Twenty-fifth. Assuming, but by no means conceding, that plaintiff has a right over against this defendant, pursuant to Part IV, Section 413, of the Interstate Commerce Act (49 U. S. C. A., Sec. 1013) to recover the amount of loss, damage, injury or delay sustained on the line of this defendant to shipments transported by this defendant, such right over may be modified, limited and regulated by agreement between plaintiff and defendant; and such right over has been modified, limited and regulated by the terms and conditions of the Uniform Rail Bill of Lading contract entered into between plaintiff and this defendant, based upon valuable and valid consideration, upon each carload shipment transported in the manner hereinabove described by defendant for plaintiff and which said bill of lading provides in Section 2(b) thereof that as a condition precedent to recovery for any loss, damage, injury or delay to such shipment claim therefor must be filed with the initial or delivering carrier in the rail transportation only or the rail carrier issuing the bill of lading or the rail carrier on whose line the loss, damage, injury or delay occurred, within nine months from delivery of said shipment at the rail tariff destination.

[fol. 23] Twenty-sixth. By reason of the foregoing, the filing of claim pursuant to said Uniform Rail Bill of Lading contract is a condition precedent to any exercise by the plaintiff, pursuant to Part IV, Section 413 of the Interstate

Commerce Act (49 U. S. C. A. Section 1013), of any claimed right over against this defendant.

Wherefore, this defendant demands judgment dismissing the amended complaint herein against it, together with its costs and disbursements.

Rowland L. Davis, Jr., Attorney for Defendant, The Delaware, Lackawanna and Western Railroad Company, Office and Post Office Address, No. 140 Cedar Street, Borough of Manhattan, New York 6, New York.

[fol. 24] EXHIBIT A, ANNEXED TO FOREGOING AMENDED ANSWER

Uniform Straight Bill of Lading

The Delaware Lackawanna & Western R. R.

Note:

Following exhibits have been shot at best possible reduction: They have been included despite the fact that copy is so poor that complete legibility is out of the question, and because these exhibits may, in spite of their condition, may serve the needs of the users of these cards.

—Cameraman

Form [illegible] 56 8-41 1st SHEET

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

UNIFORM STRAIGHT BILL OF LADING

Shipper's No._____

Agent's No._____

1

ORIGINAL—NOT NEGOTIABLE

The Delaware, Lackawanna and Western Railroad Company

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At_____ 194____

From_____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to_____

Destination_____ State of_____ County of_____

Route_____

Delivering Carrier_____ Car Initial_____ Car No._____

No. Packages	Description of Articles, Special Marks, and Exceptions	★ Weight (Subject to Correction)	Class or Rate	Check Column

CONTRACT TERMS AND CONDITIONS

Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotives or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without proper full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignee, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotives or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without proper full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignee, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

Form FTD 50A 8-41 2nd SHEET

THIS SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

Shipper's No._____

2

Agent's No._____

The Delaware, Lackawanna and Western Railroad Company

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

At_____ 194____

From_____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to_____

Destination_____ State of_____ County of_____

Route_____

Delivering Carrier_____ Car Initial_____ Car No._____

No. Packages	Description of Articles, Special Marks, and Exceptions	★ Weight (Subject to Correction)	Class or Rate	Check Column

[fol. 26] EXHIBIT B, ANNEXED TO FOREGOING AMENDED ANSWER

Shipping Order

The Delaware, Lackawanna & Western R. R.

CONTRACT TERMS AND CONDITIONS.

Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then, if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

at shipper's expense point in carrier's judgment and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotives or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

back

or delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be recorded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

27A 4 20B

[fol. 28] IN DISTRICT COURT OF THE UNITED STATES

ANSWER OF DEFENDANT PENNSYLVANIA RAILROAD CO. AS TYPICAL

The Pennsylvania Railroad Corporation, one of the defendants named herein and sued as Pennsylvania Railroad Company, answers the amended complaint herein as follows:

First. Admits the allegations contained in paragraphs designated "1," "2," "3," "4," "5," "6," "7," "8" and "9" of the amended complaint herein except that as to the United States Code reference in paragraph numbered and designated "9" of the complaint this defendant states that the correct reference is 28 U. S. Code § 41 (8).

Second. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "10" except that this defendant admits that the business of plaintiff as a freight forwarder subject to the provisions of Part IV of the Interstate Commerce Act consists principally of receiving for reshipment various individual less-than-carload shipments of merchandise from various owners, shippers and consignors, assemblying same in carlot quantities which in some instances are shipped by plaintiff in railroad carload quantity by railroad common carriers to various rail destinations at the termination of which rail transit plaintiff makes delivery of each individual shipment to the consignee thereof directly or where truck delivery is necessary by highway motor common carrier, as the circumstances of such business and practice of plaintiff are specifically and more fully set forth hereinafter in the "First" separate, [fol. 29] independent and complete defense of this defendant in this answer.

Third. In answer to paragraph of the amended complaint herein numbered and designated as "11" this defendant for purposes of accuracy refers to the form, terms and conditions of the Uniform Bill of Lading in effect and prescribed by the Interstate Commerce Commission for issuance to shippers by this defendant upon freight shipments received by this defendant and other railroad common carriers for transportation and which has been published by this defendant and filed with the Interstate Commerce Commis-

sion, copy of which said Uniform Bill of Lading is attached to this answer as Exhibit "A" and made a part hereof to the same extent as if specifically set forth herein; and further that this defendant denies any knowledge or information sufficient to form a belief as to the practices of plaintiff under all circumstances as to issuance of bill of lading in the transportation which it performs or in which it participates and as to the terms, provisions and conditions of any such bill of lading issued by the plaintiff this defendant refers to the bill of lading, if any, published by plaintiff and filed with the Interstate Commerce Commission.

Fourth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "12" except that this defendant admits that during the regular course of transportation of shipments made by the plaintiff over the railroad of this defendant claim for damage or injury to some such shipments is made by plaintiff and that claim for said damage or injury when so made is made in writing by plaintiff and in plaintiff's name and in its behalf as shipper or consignee and that plaintiff some-
[fol. 30] times affixes supporting documents to such claim when so made.

Fifth. Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "13" and "15" and begs leave to refer on the trial to the specific provisions of the Interstate Commerce Act, Title 49 U.S.C.A. §§ 20 (11), 20 (12) and 1013.

Sixth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "14" and alleges that the uniform and long continued construction of this defendant and substantially all other rail carriers subject to Part I of the Interstate Commerce Act of § 20 (12) of said Act has been that the right over provided for in said section is subject to modification, regulation or limitation by contract, arrangement or agreement between the receiving or delivering rail carrier and the rail carrier upon whose lines the loss, damage or injury may have occurred; and further alleges that this defendant and other rail carriers subject to Part I of said Act have

agreed to settle loss and damage freight claim liability among themselves, to make payments and provide for reimbursement therefor among themselves in accordance with an agreement to that effect.

Seventh. Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "16" and "17," except that it admits that unless claim in writing for loss, damage or injury to a shipment transported by this defendant is filed with this defendant or a connecting rail common carrier by the lawful holder of the bill of lading in accordance with the contract terms and conditions [fol. 31] of the Uniform Bill of Lading, this defendant, pursuant to its duties and obligations to the shipping public as provided for in Part I of the Interstate Commerce Act and all provisions thereof and laws supplemental and auxiliary thereto, refuses to make payments on said claim and denies and disallows same; and this defendant further admits and expressly asserts that it applies and enforces the bill of lading terms and conditions with respect to filing of claim by plaintiff as a shipper and consignee of shipments made by it without discrimination or preference the same as it applies and enforces the same with respect to any other shipper or consignee using railroad common carrier services.

For a First, Separate, Independent and Complete Defense, This Defendant Alleges, on Information and Belief:

Eighth. The business of plaintiff as a freight forwarder subject to Part IV of the Interstate Commerce Act consists in part of holding itself out to provide transportation of property in Interstate Commerce and, in the ordinary and usual course of its undertaking, of (A) assembling and consolidating or providing for assembling and consolidating shipments of such property and performing or providing for the performance of break-bulk and distributing operations with respect to such consolidated shipments as hereinafter more fully alleged, and (B) assuming responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizing for the whole or part of the transportation of such shipments the services

of a carrier or carriers subject to Part I, II or III of the Interstate Commerce Act.

Ninth. In the course of such business plaintiff receives at various assembly points numerous individual less than [fol. 32] carload or less than truckload shipments of freight which have been delivered at said assembly points by vehicles of the consignors or of local draymen, or of a highway motor common carrier pursuant to a tariff in the publication and filing of which with the Interstate Commerce Commission said highway motor common carrier and the plaintiff have joined. Such tariff provides for a joint rate and through route as between them for the entire through transportation from origin to ultimate destination of each such shipment. Plaintiff and such highway motor common carriers are authorized and permitted to join in such tariff by the provisions of the Interstate Commerce Act, Part II and Part IV thereof. A bill of lading is issued to the consignor of each of such shipments by plaintiff, or by the highway motor common carrier, for the through transportation to the ultimate consignee named therein, wherein plaintiff assumes responsibility for the transportation of such property from the point of receipt from such consignor to the time and place of ultimate delivery to the consignee named in such bill of lading.

Tenth. At said assembly points said individual less-than-carload shipments are sorted, and assembled and consolidated by plaintiff into either trucklot quantities for further highway transportation or railroad carlot quantities for rail transportation. The carlot quantities are then tendered to and delivered to this defendant as new, original, single "carload" shipments of mixed merchandise for transportation by this defendant and its connecting rail carriers, when such are necessary, pursuant to the terms of the Uniform Rail Bill of Lading; and are consigned to the plaintiff at designated rail tariff destinations on the lines of this defendant or said connecting rail carriers and for delivery [fol. 33] as single carload shipments to this plaintiff at said respective designated rail tariff destinations. Said carload shipments are not consigned to the consignees or destinations named in plaintiff's or the highway motor common carrier's individual bills of lading previously issued as aforesaid for the component parts of said carload shipments. The tender and consigning referred to in this

paragraph is effected by means of a "Shipping order," a copy of which is annexed hereto marked Exhibit B. The said shipments are not tendered to this defendant for transportation upon a through route, if any, specified in the bills of lading previously issued by plaintiff upon said less than carload shipments or on the component parts of said carload shipments as aforesaid, but are tendered for rail transportation to a rail destination upon a route specifying only defendant or its aforesaid connecting rail carriers. There is no rail routing specified or described in the bills of lading issued by plaintiff or by a highway motor common carrier as aforesaid.

Eleventh. Upon each of said carload shipments tendered and delivered by plaintiff to this defendant as aforesaid this defendant issues a bill of lading prescribed for use by rail carrier by the Interstate Commerce Commission which bill of lading shows the plaintiff to be shipper or consignor and also shows the plaintiff to be consignee thereon and describes the shipment as a mixed "carload" of miscellaneous merchandise. Such bill of lading recites a rail tariff destination on the line of defendant or connecting rail carriers to which the carload is to be transported as aforesaid. Such bill of lading does not show as consignor or as consignee any of the persons shown as consignors or as consignees in the several bills of lading previously issued as aforesaid by the plaintiff or the highway motor common carrier upon component parts [fol. 34] of said carload shipments; and such bill of lading does not recite as the destination of the carload shipment the several destinations recited in the aforesaid bills of lading previously issued by plaintiff or said highway motor common carrier upon the component parts of said shipments; and said rail bill of lading provided solely for and is effective solely for the railroad transportation of said carload shipment from the point received by the rail carrier to the destination named in said rail bill of lading.

Twelfth. Said railroad transportation of the aforesaid carload shipments is performed solely pursuant to the railroad classification, tariffs, exceptions and supplements thereto duly published and filed with the Interstate Commerce Commission and applicable to the transportation performed by this defendant and connecting rail carriers for all shippers of freight alike, and not solely applicable

to forwarders under Part IV of the Interstate Commerce Act, and which particularly include, among others, Rules 1, 7 and 14, copy of each of which said rules is annexed hereto marked Exhibit C and also pursuant to the terms and conditions of said Uniform Rail Bill of Lading, Exhibit A annexed hereto. Said classification, tariffs, exceptions and supplements thereto provide for joint rates and through routes in the rail transportation from the points the carload shipments are received by the rail carriers to the rail destinations as between initial, connecting and delivering rail carriers, but do not provide for joint rates or through routes as between any rail carrier or carriers on the one hand and forwarders subject to Part IV of the Interstate Commerce Act and specifically plaintiff in this action on the other.

Thirteenth. At termination of said rail transportation, said carload shipments are delivered by this defendant [fol. 35] or its connecting rail carrier to plaintiff at the rail destinations pursuant to plaintiff's aforesaid tender and recited in the aforesaid rail bill of lading issued to plaintiff upon said carload shipments as aforesaid.

Fourteenth. Subsequent to delivery to the plaintiff at rail destinations by this defendant or its connecting rail carriers of said carload shipments, this plaintiff breaks up and sorts said carload shipments into the separate units existing prior to assembly thereof by plaintiff at its aforementioned assembly points and delivers each of said units to vehicles of the ultimate consignees named in the bills of lading issued by plaintiff or the original highway motor common carrier, or to vehicle of a highway motor common carrier for further transportation and ultimate delivery to each respective consignee thereof, pursuant to filed and published tariff, or to vehicles of local draymen; or said shipments so broken up are again assembled and consolidated into truckloads for further transportation by highway motor common carrier pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff prior to ultimate breaking up and delivery to each respective consignee or said shipments so broken up are again assembled and consolidated in new, separate, carlot shipments for further transportation by rail carrier on new rail carload bills of

lading pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff prior to ultimate breaking up and delivery to each respective consignee.

Fifteenth. For the transportation of said carload shipments by defendant and its connecting rail carriers, as aforesaid, plaintiff is obligated to pay, and for its own [fol. 36] account does pay to defendant by prepayment at time of tender of said carload shipments by plaintiff to defendant or at time of delivery to plaintiff as consignee by defendant of said carload shipments as prescribed by Part I of the Interstate Commerce Act, full tariff railroad transportation charges based on carload rates for transportation of said carload shipments pursuant to the terms and conditions of the said Uniform Rail Bill of Lading. Said charges are considerably less in amount than the aggregate charges would be if each of the individual units comprising said carload were shipped over defendant's rail lines and that of its said connecting rail common carriers as a less than carload shipment, all of which is pursuant to classification, tariffs, exceptions and supplements thereto published and filed with the Interstate Commerce Commission by this defendant and connecting railroad carriers participating therein and applicable to such transportation and service when such rail service is used, and to which said classification, tariffs, exceptions and supplements plaintiff is not a party. Plaintiff does not pay to the defendant the ten per cent additional tariff charges provided for in Rule 1 of the aforesaid Classification hereinabove referred to.

Sixteenth. For the services performed by plaintiff for the original consignor or shipper to whom plaintiff or a participating highway motor common carrier has issued a bill of lading, as aforesaid, plaintiff collects a charge pursuant to filed and published tariff, based upon plaintiff's less than carload rate for the shipment covered by each such bill of lading for the services performed by plaintiff pursuant to Part IV of the Interstate Commerce Act; and said tariff charge is divided and apportioned between plaintiff and the highway motor common carrier participating, when the services of such highway motor common [fol. 37] carrier are utilized by plaintiff, in accordance with

an agreement for such division and apportionment. Neither this defendant nor any of its connecting rail carriers receives from plaintiff said charge, or any part thereof, nor does it or any of them participate in any division or apportionment of said charge.

Seventeenth. There is no authorization or permission in the Interstate Commerce Act or any other law permitting this defendant or any railroad as a railroad common carrier to enter into any agreement with plaintiff to perform transportation services under a joint rate or through route, or to engage in any practice different from this defendant's or any railroad common carrier's published and filed tariffs, classifications, exceptions and supplements thereto, or to engage in any practice different from that accorded all other shippers or receivers of freight shipments transported over this defendant's railroad or any railroad common carrier.

Eighteenth. The bills of lading issued by plaintiff as fowarder under Part IV of the Interstate Commerce Act, or by a highway motor common carrier, as aforesaid, on the individual less-than-carload shipments, as aforesaid, are not in fact issued on the same form, and do not in fact contain all of the same terms and conditions, as the aforesaid uniform bill of lading prescribed by the Interstate Commerce Commission for use by rail carriers subject to Part I of the Interstate Commerce Act, and such bills of lading issued by plaintiff and such highway motor common carriers may be varied as to form, terms and conditions by filing new forms, terms and conditions with the Interstate Commerce Commission.

Nineteenth. Neither the carload shipments nor any of the component parts thereof are received by defendant or [fol. 38] other common carriers by rail from plaintiff, as hereinbefore alleged, for transportation pursuant to the terms and conditions of the bills of lading previously issued by plaintiff to other persons upon component parts thereof, but are received for transportation pursuant to the terms and conditions of the bills of lading issued by this defendant, and also pursuant to the published and filed classification, tariffs, exceptions and supplements thereto of this defendant and its connecting rail common carriers, in which classifica-

tion the uniform bill of lading issued by the defendant is incorporated.

Twentieth. With respect to carload shipments of the character hereinabove set forth received by this defendant as delivering rail carrier from any connecting rail carrier for delivery to plaintiff, the same practice and course of dealing are in effect as with respect to shipments received by this defendant from plaintiff as hereinbefore alleged.

Twenty-first. The business, practice, course of dealings, classifications, tariffs, exceptions and supplements thereto and uniform rail bill of lading hereinbefore referred to in paragraphs "Eighth" to "Twentieth," both inclusive, of this answer as now being carried on and in effect, were carried on and in effect in substantially the same manner during all times referred to in the complaint, and since the enactment of Part IV of the Interstate Commerce Act, and for many years prior thereto, except that prior to enactment of said Part IV plaintiff had no obligation in law to publish and file with the Interstate Commerce Commission its classification and tariffs, or to abide thereby.

Twenty-second. Claims have been filed by this plaintiff against this defendant for loss, damage, injury or delay occurring on the line of this defendant or its connecting [fol. 39] rail carriers to shipments, received from or delivered to this plaintiff by this defendant as aforesaid. It has been the uniform practice of plaintiff to file such claims as shipper or consignee of such shipments, and plaintiff has never supported such claims by evidence of any judgment or transcript thereof procured against it or by evidence of any receipt for sums paid out by it. Payment of such claim by this defendant would constitute a preference or advantage to plaintiff over other shippers in violation of the Interstate Commerce Act.

Twenty-third. By reason of the foregoing any and all liability of this defendant to plaintiff for loss, damage, injury or delay occurring on the line of this defendant or its connecting carriers as aforesaid to the shipments received from or delivered to plaintiff as aforesaid is measured by the terms and conditions of said Uniform Rail Bill of Lading (Exhibit A hereto), and the aforesaid classification, tariffs, exceptions and supplements thereto. As a condi-

tion precedent to recovery for any such loss, damage, injury or delay, the plaintiff must comply with the provision in Section 2(b) in the said Uniform rail Bill of Lading, providing for the filing of claim; independently of said Uniform rail Bill of Lading the plaintiff has no right of action against this defendant, and has no right of action against this defendant under any bill of lading issued by plaintiff or a highway motor common carrier to any person as aforesaid.

For a Second, Separate, Independent and Complete Defense This Defendant Alleges on Information and Belief:

Twenty-fourth. This defendant repeats, reiterates and realleges each and every allegation and averment contained in paragraphs of this Answer numbered and designated as [fol. 40] "Eighth" to "Twenty-second," both inclusive, with the same force and effect as if herein specifically set forth at length.

Twenty-fifth. Assuming, but by no means conceding, that plaintiff has a right over against this defendant, pursuant to Part IV, Section 413, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1013) to recover the amount of loss, damage, injury or delay sustained on the line of this defendant to shipments transported by this defendant, such right over may be modified, limited and regulated by agreement between plaintiff and defendant; and such right over has been modified, limited and regulated by the terms and conditions of the Uniform rail Bill of Lading contract entered into between plaintiff and this defendant, based upon valuable and valid consideration, upon each carload shipment transported in the manner hereinabove described by defendant for plaintiff and which said bill of lading provides in Section 2(b) thereof that as a condition precedent to recovery for any loss, damage, injury or delay to such shipment claim therefor must be filed with the initial or delivering carrier in the rail transportation only or the rail carrier issuing the bill of lading or the rail carrier on whose line the loss, damage, injury or delay occurred, within nine months from delivery of said shipment at the rail tariff destination.

Twenty-sixth. By reason of the foregoing, the filing of claim pursuant to said Uniform rail Bill of Lading contract

is a condition precedent to any exercise by the plaintiff, pursuant to Part IV, Section 413 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1013), of any claimed right over against this defendant.

[fol. 41] Wherefore, this defendant demands judgment dismissing the amended complaint herein against it, together with its costs and disbursements.

Bleakley, Platt & Walker, by Roswell P. C. May, Member of the Firm, Attorneys for Defendant, The Pennsylvania Railroad Company, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, New York.

[fol. 42] EXHIBIT A, ANNEXED TO FOREGOING ANSWER

Uniform Straight Bill of Lading the Pennsylvania Railroad Co.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 18, 1922, as amended August 1, 1938, and June 18, 1941.)

F. D. 2526-A
2500M. 2-9-45
8½x11

UNIFORM STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

THE PENNSYLVANIA RAILROAD COMPANY

1

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

CAR INITIALS AND NUMBER

DATE

SHIPPER'S NUMBER

AT

No. (

FROM

CONSIGNED TO

Mail or street address of consignee—For purposes of notification only.

DESTINATION

STATE OF

COUNTY OF

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced

$

ROUTE

DELIVERING CARRIER

If charges are to be prepaid, write or stamp here, "To Be Prepaid."

Subject to Section 7 of Conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

SIGNATURE OF CONSIGNOR

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

PER

SHIPPER

PER

Permanent Postoffice Address of Shipper

WEIGHED AT

GROSS TARE ALLOWANCE NET

★ If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

AGENT

PER

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE	

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: PROVIDED, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided, after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: PROVIDED, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: PROVIDED, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: PROVIDED, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignee, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned, at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc., and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(329)

Back

[fol. 44] EXHIBIT B, ANNEXED TO FOREGOING ANSWER

Shipping Order the Pennsylvania Railroad Co.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 1st, 1941.)

F. D. 2526-A
2500M 2-9-46
8½x11

THIS SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

THE PENNSYLVANIA RAILROAD COMPANY

2

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

CAR INITIALS AND NUMBER

AT

No. ( )

FROM

DATE

SHIPPER'S NUMBER

CONSIGNED TO

Mail or street address of consignee—For purposes of notification only.

DESTINATION

STATE OF

COUNTY OF

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

ROUTE

DELIVERING CARRIER

Charges Advanced:

☜ If charges are to be prepaid, write or stamp here, "To Be Prepaid."

$

Subject to Section 7 of Conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

SIGNATURE OF CONSIGNOR

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

PER

WEIGHED AT

GROSS	TARE	ALLOWANCE	NET

★ If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

☜ **Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.**

SHIPPER

PER

Permanent Postoffice Address of Shipper

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE			

PER

★ If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

☜ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

SHIPPER

PER

Permanent Postoffice Address of Shipper

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE			

45

Front

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: PROVIDED, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided, after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: PROVIDED, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: PROVIDED, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: PROVIDED, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignee, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned, at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc., and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Back

PER

Permanent Postoffice
Address of Shipper

AGENT

PER

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE

Front

7

[fol. 46] EXHIBIT C, ANNEXED TO FOREGOING ANSWER

Rules

EXHIBIT "C"

Consolidated Freight Classification Numbers 14, 15 and 16, which were in effect between January 1, 1941 and the date of the commencement of this action, provided substantially as follows with respect to Rules 1, 7 and 14 thereof:

RULE 1.

ARTICLES CLASSIFIED SUBJECT OR NOT SUBJECT TO UNIFORM BILL OF LADING CONDITIONS.

(a) Unless otherwise provided, when property is transported subject to provisions of Official Classification, Southern Classification, Western Classification or Illinois Classification, or either of them, the acceptance and use are required, respectively, of Uniform Domestic Bill of Lading, "Straight" or "Order" (see pages 302 to 306, inclusive), or Uniform Export Bill of Lading, "Straight" or "Order" (see pages 307 to 312, inclusive).

(b) In order that consignor may have option of shipping property, either subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, hereinafter set forth, or under the liability imposed upon common carriers by common law and Federal and States statutes applicable thereto, the Official Classification, Southern Classification, Western Classification and Illinois Classification provide for different rates and for different forms of Bills of Lading to be used, respectively, as consignor may elect to have a limited liability or a common carrier's liability service.

(c) Unless other provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading (see pages 302 to 306, inclusive), or Uniform Export Bill of Lading (see pages 307 to 312, inclusive), as the case may be. If consignor elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, he should so notify agent of forwarding carrier at time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in order to secure the reduced rate.

(d) Property carried not subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, will be carried at carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be 10% higher (subject to a minimum increase of 1 cent per 100 lbs.) than the rate charged for property shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be.

(e) When consignor gives notice to agent of forwarding carrier that he elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, but desires a common carrier's liability service at the higher rate charged for that service, carrier must print, write or stamp upon Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, a clause signed by the agent reading: "In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law; but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability."

RULE 7.

ONE CONSIGNOR, CONSIGNEE AND DESTINATION ON BILLS OF LADING. FREIGHT CONSIGNED "TO ORDER"

Unless otherwise provided:

The name of only one shipper, one consignee and one destination shall appear on a shipping order or bill of lading, except that the shipping order and bill of lading may specify the name of a party at the same destination to be notified of the arrival of shipment.

* * * * * * * * * *

RULE 14.

DEFINITION OF CARLOAD FREIGHT.

Section 1. Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar day from midnight to midnight, by one shipper for delivery to one consignee at one destination and is loaded by shipper and unloaded by consignee. Only one bill of lading from one loading point and one freight bill shall be issued for such CL shipment. The minimum CL weight provided is the lowest weight on which the CL rating or rate will apply.

Section 2. Carload ratings or rates also apply on carload shipments (as described in Section 1), which, under tariffs lawfully on file with the Interstate Commerce Commission (on interstate traffic) and State Commissions (on intrastate traffic) are accorded additional services or privileges described below:

(a) Loading by the carrier, under the provisions of the tariff, applicable at shipping station or stopover station.

(b) Unloading by the carrier, under the provisions of the tariff applicable at destination station or stopover station.

(c) "Split deliveries" (delivery to more than one party) at destination by the carrier, under provisions of the tariff applicable at destination station.

(d) Stopover privileges to complete loading or to partly unload while en route under provisions of tariffs of carriers serving the stopover station.

Section 3. When freight is loaded in or on a car by shipper and such car is not fully loaded but is tendered as a CL shipment, and car is forwarded without other freight in or on it, the shipment will be charged for as a carload.

[fol. 48] IN DISTRICT COURT OF THE UNITED STATES

PLAINTIFF'S INTERROGATORIES.

Interrogatories to the defendants, Wabash Railroad Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, answer under oath waived:

1. State whether or not, at all times referred to in the complaint herein, the Uniform Bill of lading employed by the defendants provided, *inter alia*.

> "Sec. 1(a). The carrier or party in possession of any of the property herein described shall be liable as at common-law for any loss thereof or damage thereto, except as hereinafter provided.
>
> * * * * * * *
>
> "Sec. 2(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, or carrier in possession of the property when the loss, damage, injury, or delay occurred, within nine months after delivery of the property (or in the case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within nine months after a reasonabe time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given the carrier by the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the [fol. 49] notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

2. State whether the Principles and Practices and Freight Claims Rules of the Freight Claim Division of the Association of American Railroads specifies any notice of claim or period of filing thereof upon connecting rail carriers, as a prerequisite of recovery or contribution in the settle-

200M—1-14—CPC Form 113 Printed in U. S. A.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930 and June 15, 1941.) 1st SHEET

UNIFORM STRAIGHT BILL OF LADING

Shipper's No. _____

ORIGINAL—NOT NEGOTIABLE

Agent's No. _____

WABASH RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at _____, 194—

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____

Delivering Carrier _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

[The signature here acknowledges only the amount prepaid.]

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

_____ Shipper. _____ Agent.

© Per _____ Per _____

Permanent postoffice address of Shipper _____

1

53

Front

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided,** That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted hereln, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided,** That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided,** That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided,** That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. **Provided, that,** where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only, and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. As to shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

Back

200M—9-44—CPC

Form 113

Printed in U. S. A.

(For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

2nd SHEET

THIS SHIPPING ORDER must be legibly filled in, in ink, in indelible pencil, or in carbon and retained by the Agent.

Shipper's No. _____

Agent's No. _____

WABASH RAILROAD COMPANY

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

at _____, 194__

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____

Delivering Carrier _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

_____ Shipper.

Per _____

Permanent postoffice address of Shipper _____

☞ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

2

53b

Front

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided,** That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided,** That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided,** That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided,** That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. **Provided, that,** where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

53c

Back

200M—9-44—CPC

Form 113

Printed in U. S. A.

(For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

3rd SHEET

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading nor a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No. _____

Agent's No. _____

WABASH RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at _____, 194

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____

Delivering Carrier _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

MEMORANDUM

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per _____

_____ Shipper.

Per _____

_____ Agent.

Per _____

Permanent postoffice address of Shipper _____

3

CON. P. CURRAN PRINTING CO., ST. LOUIS, MO.

53d

Front

ment between carriers of freight loss and provisions thereof.

Dated August 16, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff.

To: Messrs. Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City. Rowland L. Davis, Jr., Esq., Attorney for Defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 140 Cedar Street, New York City.

[fol. 50] IN DISTRICT COURT OF THE UNITED STATES

ANSWER TO INTERROGATORIES OF WABASH R. R. CO. AS TYPICAL

The defendant, Wabash Railroad Company, answers the interrogatories dated August 16, 1946, as follows:

1. In answer to interrogatory designated "1," said defendant states that at all the times referred to in the complaint herein said defendant used in connection with shipments tendered to it by the plaintiff and all other shippers the Uniform Bill of Lading prescribed by the Interstate Commerce Commission and set forth in Consolidated Freight Classification No. 16, issued October 25, 1943, effective December 6, 1943, and the Supplements thereto, a copy of which said Uniform Bill of Lading containing the provisions and terms thereof is attached hereto, marked "Exhibit 1."

2. In answer to interrogatory designated "2," this defendant will submit upon the trial of this case and offer in evidence a copy of the "Principles and Practices" and "Freight Claim Rules" of the Freight Claim [fol. 51] Division of the Association of American Railroads.

Dated New York, N. Y., August 22, 1946.

Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company.

To: Clark, Carr and Ellis, Esqs., Attorneys for Plaintiff, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fol. 52] EXHIBIT 1, ANNEXED TO FOREGOING ANSWER TO INTERROGATORIES

Uniform Bill of Lading, Shipping Order and Memorandum of Wabash Railroad Co.

Note:

Page 40 is in the frame immediately above this one.

—Cameraman

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided,** That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided,** That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided,** That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided,** That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. **Provided, that,** where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

53e

Back

3

[fol. 54] IN DISTRICT COURT OF THE UNITED STATES

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

SIRS:

Please Take Notice that upon the summons and complaint herein and the answers of the defendants, Wabash Railroad Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and upon the annexed affidavit of William J. H. McEntee, sworn to August 16, 1946, the undersigned will move this court at a term for motions therein, to be held at Room 506, United States Court Building, the 26th day of August, 1946, at 10:00 A. M. thereof, for an order granting summary judgment against said defendants for the relief demanded in the complaint, and for such other and further relief as may be just.

Dated August 16, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff.

To: Messrs. Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City. Rowland L. Davis, Jr., Esq., Attorneys for Defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 140 Cedar Street, New York City.

[fol. 55] IN DISTRICT COURT OF THE UNITED STATES

AFFIDAVIT OF WILLIAM J. H. MCENTEE, READ IN SUPPORT OF MOTION

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

William J. H. McEntee, being duly sworn, says, I am and have been for many years Vice-President of Acme Fast Freight, Inc., the plaintiff in this action, a freight forwarder qualified and operating pursuant to the provisions of Part IV of the Interstate Commerce Act, 49 U. S. Code § 1001, *et seq.*

This action is to obtain a declaratory judgment as to the effect of this statute, which was enacted in 1942, in regard to the provision of the uniform bill of lading with

respect to notice of claim. The uniform bill of lading is issued to shippers by both plaintiff and rail carriers; it is filed as part of the tariff classifications of both, and hence has tariff status, to the extent that it is valid and applicable. The notice of claim provision is as follows:

> "Sec. 2(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property * * * or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. * * *"

Before the enactment of Part IV it was the general and I believe correct belief that although freight forwarders had the general characteristics of carriers in their dealings with the public, they were not "carriers subject to" the Interstate Commerce Act, to whom the subrogation provi- [fol. 56] sions of the Carmack Amendment, 49 U. S. Code §20 (11), (12), but were shippers vis-a-vis the rail, motor and water carriers they employed. Hence although requiring timely written notice of claim from shippers, they in turn gave notice of claim to rail carriers of loss and damage occurring in the transportation service of the latter. However, some instances inevitably arose, and will continue to arise, where the shipper's notice to the plaintiff was timely, but the following notice to the rail carrier was over the nine months' period; and such claims the rail carriers felt obliged to decline regardless of their merits.

The enactment of Part IV gave freight forwarders the status of carriers subject to the Interstate Commerce Act, and §1013 in terms made the provisions of the Carmack Amendment applicable to them, and provided that they should be considered the receiving and delivering carrier. Consequently I believe it follows (1) that in freight forwarder transportation the forwarder is the "receiving carrier" to whom notice satisfying the bill of lading provision may be given, (2) that the forwarder's bill of lading fixes the rights of all parties, and that where timely notice is given the forwarder, according to its bill of lading, its liability and the liability of connecting rail or other carriers becomes fixed, and cannot be varied by intermediate bill of lading, tariff, or contractual arrangements of any sort.

This conclusion is strengthened by the fact, as I am informed and believe, that in more than thirty years of settlements under the subrogation provisions of the Carmack Amendment as it applies to connecting rail, water, or express carriers, it has never been considered necessary nor is it the practice to file any notice of claim as such upon the connecting carriers to establish a subrogation claim. The Freight Claim Rules and Principles and Practises of the Freight Claim Division of the Association of American Rail-[fol. 57] roads, to which all the defendants in this action subscribe, do not provide for any notice of any sort within any period of time as a prerequisite of subrogation or contribution between receiving and connecting carriers.

Since the enactment of Part IV plaintiff has had upward of sixty claims against rail carriers in all parts of the country in which notice of claim was timely upon it, but in which failure to give such notice to the responsible rail carrier is the sole or principal defense or basis of declination. Under date of March 16, 1946, an opinion to the Freight Claim Division of the Association of American Railroads, concluding that notice of claim from forwarders was still necessary, was circulated to members of the Association. Since the circulation of this all rail carriers with whom the question was current have declined the claims in question, referring in most instances to this opinion as their authority. For the information of the court, a copy of this opinion is annexed.

These claims are for the most part for limited amounts; they cannot for jurisdictional reasons be tried in one place and cannot without undue expense be tried separately. Only this issue of law is present in most of them, and an authoritative determination of this issue by a United States Court, will, I believe, permit their disposition without litigation in the majority of instances. The case is consequently, as I am informed by my counsel and believe, an appropriate one for a declaratory judgment of this court.

I am informed by counsel and believe that there is no issue of fact herein between the parties and that there is no merit in the legal contention of the defendants. The court is therefore respectfully requested to grant an order directing summary judgment in favor of the plaintiff, and for such other relief as may be just.

(Sworn to by William P. H. McEntee, Aug. 16, 1946.)

[fol. 58] OPINION BY FREIGHT CLAIM DIVISION, ANNEXED TO FOREGOING AFFIDAVIT OF W. J. H. MCENTEE

Association of American Railroads

Freight Claim Division

1740 Broad St. Station Bldg., Philadelphia 4, Pa.

Time for the filing of claims by freight forwarders against rail lines

March 16, 1946.

Mr. C. H. Dietrich
Executive Vice-Chairman
Freight Claim Division, A.A.R.
Chicago, Illinois

Dear Mr. Dietrich:

This will respond to your letter of the 11th ult., your file D-899-11, which presents the inquiry with respect to the subject listed above. Let me say that the matter presented, as you no doubt are aware, is one of first impression. And the position claimed by the forwarder mentioned in your letter, as is also well known, is contrary to the prevailing practice of freight forwarders generally with relation to this particular subject. Consequently it has been necessary to give your inquiry considerable investigation and study, as you will see from what follows: That accomplished, I have communicated with the several members of the Advisory Committee, and am requested to answer you as follows:

With respect to the rail lines which come under Part I of the Commerce Act, authority is given the Interstate Commerce Commission over the form and substance of their bills of lading (Sec. 1 [6]). See *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341. The Commission has prescribed [fol. 59] such forms for both domestic and foreign use. *Re Bills of Lading*, 14 I. C. C. 346, 52 I. C. C. 671. In the case of the export bill, its use as prescribed by the Commission is mandatory under a Commission order. And while no order has been entered by the Commission with respect to the form of our domestic bill, the one prescribed by the Commission has been used by all the rail lines, and, with some changes also approved by the Commission, is presently in use. It has always been the practice to have

in those bills provisions as to times for the filing of claim and the institution of suit. And since the rail form of bill is filed in the rail Classification, that bill has acquired a tariff status. Its contract terms and conditions may not be waived. *Davis v. Henderson*, 266 U. S. 92.

In the practical handling of this forwarder freight, the forwarder is in reality the shipper. The rail carrier issues its bill of lading to the forwarder; and while in the possession of the rail lines, the freight is carried necessarily under the contract terms and conditions of the rail bill.

> "It has long been the law that 'the carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed.' *California Commercial Assn.* v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 427; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444. The consolidated consignment with which we are here dealing is shipped over the railroad by the forwarder in its name and to itself as consignee. The forwarder, [fol. 60] therefore, is the only shipper or consignee known to the railroad in so far as this traffic is concerned. It must be, therefore, that the forwarder as it now operates, in its relation to the railroads, is a shipper."
>
> *Freight Forwarding Investigation*, 229 I. C. C. 201, 297-8 (1938).

The freight forwarders came under the Interstate Commerce Act in the statute of May 16, 1942 (56 Stat. 284), which is now Part IV of the Commerce Act. The portions of the Forwarder Act dealing with the matter here under discussion are these:

> Sec. 402 (a) (5). "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce,

and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

(7) "The term 'service subject to this part' means any or all of the service in connection with the trans- [fol. 61] portation in interstate commerce which any person undertakes to perform or provides as a freight forwarder or which such person is authorized or required by or under the authority of this part to perform or provide; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to the Civil Aeronautics Act of 1938, as amended, are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 203 (b) (7a) of this Act is utilized."

"Bills of Lading and Delivery of Property

Sec. 413. "The provisions of section 20 (11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this part, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20 (11) and (12). When the services of a common carrier by motor vehicle subject to part II of this Act are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this part, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a

common carrier by motor vehicle subject to part II of this Act are utilized by a freight forwarder for the [fol. 62] delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and receipted for on the delivery receipt, of the freight forwarder."

Section 20 (11) of the Commerce Act imposes through liability upon the initiating and delivering rail lines. And paragraph (12) of the same section gives the rightover against any carrier on whose lines the loss, damage or injury in question may have been sustained. As a practical matter the exercise of that rightover never happens because the rail lines all use the same bill of lading, and that bill is so framed that claims may be filed against the initiating line, the delivering line, the line issuing the bill, or the line on which the loss, damage or injury may have occurred. And a disallowance by one inures to the benefit of all. *American Railway Express Co.* v. *Shidler*, 165 N. E. 336 (Appellate Court of Indiana). In addition, such matters are adjusted under Freight Claim Division rules, to which practically all rail lines are subscribers. So an action by one rail carrier against another on this matter of rightover just does not occur.

Previous to the enactment of this Part IV of the Commerce Act dealing with freight forwarders there had been considerable legislation of a Federal nature regarding the subject. For instance, in the House there were H.R. 4827, 76th Congress, 1st Session, March 7, 1939; H.R. 9089, same Congress, 3d Session, March 26, 1940; H.R. 9090, same Congress and Session, March 26, 1940; H.R. 9888, same Congress and Session, May 24, 1940; H.R. 10392, same Congress and Session, August 21, 1940; H.R. 10398, same Congress and Session, August 22, 1940; H.R. 3684, 77th Congress, 1st Session, February 28, 1941; H.R. 5178, same [fol. 63] Congress and Session, June 26, 1941; and H.R. 5179, same Congress and Session, June 26, 1941. Most of these bills carried a provision with respect to this feature and which was essentially as follows:

"The provisions of section 20 (11), part I of the Interstate Commerce Act, as amended, shall apply

with like force and effect to receipts or bills of lading of forwarding carriers."

H.R. 9090, p. 20.

H.R. 5178, however, carried a noticeably more extensive provision which was this:

"Bills of Lading and Liability for Delivery of Property

Sec. 410. "The provisions of section 20 (11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this part, with like force and effect as in the case of those persons to which such provisions are specifically applicable: *Provided*, That in respect of shipments of property moving under rates filed by a freight forwarder pursuant to the requirements of section 405 (a) the freight forwarder shall have the sole liability to its shipper for all of the service covered by such rates without regard to the form of bill, receipt, or other shipping document given or obtained by the carriers whose services are utilized by the freight forwarder in receiving or delivering such shipments."

[fol. 64] On H.R. 10398 there was a report, being No. 2901, but not of material consequence with respect to the matter at issue here. On H.R. 3684 there were extensive hearings.

In the Senate there were three resolutions: S. J. R. 117, 76th Congress, 1st Session, April 19, 1939; S. R. 146, same Congress and Session, June 19, 1939; and S. R. 146, same Congress and Session, June 19, 1939. On S. Res. 147 there was a report, being No. 679. As to bills, there were S. 3665, 76th Congress, 3d Session, March 25, 1940; S. 3666, same Congress and Session; S. 4096, same Congress and Session, June 4, 1940; and S. 210, January 8, 1941. There were extensive hearings under S. R. 146 and S. 3665, but not of material importance here. There was a report on S. 210, being No. 132 of March 20, 1941, but also not of consequence here. This bill was also considered by the House Committee, and is covered by its report No. 1172, 77th Con-

gress, 1st Session, August 13, 1941, and contains this very pertinent portion:

"Section 413. Bills of Lading and Delivery of Property

"This section makes the provisions of section 20 (11) and (12) of the Interstate Commerce Act applicable with respect to freight forwarders. The effect of this will be to require freight forwarders to give to their customers a bill of lading covering the service performed by the freight forwarder, under which the freight forwarder will assume liability for the movement of the property from point of origin to point of destination. The freight forwarder will be considered both the receiving and delivering transportation company, for purposes of section 20 (11) and (12) but in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight [fol. 65] forwarder utilizes, the freight forwarder will have the right of subrogation against the carrier under section 20 (12).

"In the ordinary course of the performance of freight forwarders' service the property to be transported is usually received from the freight forwarders' customer by a carrier whose services the freight forwarder is utilizing and is also delivered to the ultimate consignee by such carrier. It is provided in this section, in order to simplify the mechanics of rendering the service and also to relieve carriers when performing service for freight forwarders, from the ordinary and usual duties under those parts of the act regulating such carriers, that common carriers by motor vehicle subject to Part II, when receiving property for the movement of which a freight forwarder is responsible may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt of the freight forwarder. Such execution of the bill of lading or shipping receipt by the motor carrier will not, of course, transfer responsibility to the motor carrier, or in any way relieve the freight forwarder of its responsibility under the bill of lading or shipping receipt. It is also provided that a common carrier by motor vehicle subject to part II delivering property to the consignee named in the freight forwarder's bill of lading, ship-

ping receipt, or freight bill may, with the consent of the freight forwarder deliver the property on the freight bill and on the delivery receipt of the freight forwarder. It is believed that this authority granted to motor carriers, which is permissive, and which they are not required to take advantage of, will simplify the task of [fol. 66] the motor carrier and serve to definitely place the primary responsibility on the freight forwarder, where it properly belongs."

As a result of conference there emerged what we have in the Act today as Section 413.

From the foregoing it is particularly noticeable that Part I of the Commerce Act was not changed because of the addition of Part IV covering the freight forwarders. Part II, which covers motor carriers, was changed, including a change related to this discussion. See amendments to Sec. 202 (C) and 219 at the end of Part IV. What was done was to make Section 20 (11) (12) of the Commerce Act applicable to freight forwarders, specifically making the forwarder responsible both as receiving and delivering carrier. As to Section 20 (12) the forwarder which has paid the claim and which itself is not at fault, becomes entitled to subrogation against the carrier on whose line the loss, damage or injury may have been sustained. And note that the initiating or delivering carrier does not have to become the judgment-creditor. Voluntary payment and the taking of a receipt are sufficient. *Palmer* v. *Agwilines, Inc.*, 135 F. 2d 689.

While the Forwarder Act gives the rightover against the carrier on whose line the loss, damage or injury has been sustained, it does no more than just that. It does not change Section 20 (11) (12) with respect to the rail bill of lading or the rights of the carrier under that bill. And as to subrogation, the question arises with respect to subrogation as to what. Manifestly to the rights, if any, which the claimant against the forwarder may have had against the line on which the loss, damage or injury may have occurred. There may be no liability whatever against the rail line. If so there becomes nothing to subrogate. And [fol. 67] even a judgment would not be conclusive, because the case against the forwarder may have gone by default, or may have resulted because that case was not adequately defended.

Subrogation is of two kinds:

> "* * * Subrogation is either legal—that is, given by the law—or it arises out of convention or contract. Legal subrogation is allowed only in cases where the persons advancing money to pay the debt of a third person stands in the situation of a surety or is compelled to pay the debt to protect his own rights. *Shinn v. Budd*, 14 N. J. Eq. 238; *Bigelow v. Cassedy*, 26 N. J. Eq. 558. Conventional subrogation results from an agreement, made either with the debtor or creditor that the person paying shall be subrogated. *Receivers v. Wortendyke*, 27 N. J. 660; *Kocher v. Kocher*, 56 N. J. Eq. 547, 39 Atl. 536. * * *"
>
> *First Nat. Bank of Frechold v. Thompson*, 48 Atl. 333, 335.

The only change made by this statute is that it eliminates any question about the standing of the forwarder. This, of course, is contrary to the rule of law that subrogation does not inure to the benefit of a volunteer—*Watson v. Fowler*, 163 S. E. 640; or to one whose duty it is to pay—*Lackawanna Trust & Safe Deposit Co. v. Gomeringer*, 236 Pa. 179. But there the change ends. So all in all while the rightover is given, it necessarily is given with respect to the defenses which the rail line may be able to impose against the forwarder because the rail line could have interposed those same defenses against the original claimant if it had first sought the rail line instead of the forwarder.

[fol. 68] Further proof that the contract terms and conditions of the rail bill of lading are not abrogated by this forwarder legislation is shown by the fact that Sec. 404 (c) of Part IV of the Commerce Act is this:

> "It shall be unlawful for any common carrier subject to part I, II, or III of this Act to make, give, or cause any undue or unreasonable preference or advantage to any freight forwarder, whether or not such freight forwarder is controlled by such carrier, in any respect whatsoever; or to subject any freight forwarder, whether or not such freight forwarder is controlled by such carrier, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Manifestly, if the rail line should disregard its bill of lading provisions as to times for claim and suit with respect

to the forwarder and assert the same, as it must do, with respect to all other shippers, it would give the forwarder an undue advantage. Not only does Part IV forbid this, but also does Part I, Sec. 3 (1). And one of the cardinal principles of subrogation is that it may not be used to the prejudice of the legal or equitable rights of others.

> "Nor can the right of subrogation arise from the equity of contribution, as in the case of those who are equally liable for the same debt, nor from the equity of exoneration, as in the case of those who are successively liable. The plaintiff had assumed no liability. The object of subrogation is to place a charge where it ought to rest, by compelling the payment of a debt by him who ought in equity to pay it. 'In short the doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by an- [fol. 69] other is entitled to exercise all the remedies which the creditor possessed against that other, and to indemnify from the fund out of which should have been made the payment which he made:' Sheldon on Subrogation, Sec. 11. There can be no right of subrogation in one whose duty it is to pay, or in one claiming under him, against one who is secondarily liable, or, as in this case, not liable at all. In such a case payment is extinguishment. Nor will subrogation ever be enforced where the equities are equal, or the rights not clear, nor to the prejudice of the legal or equitable rights of others. Cornelius was not only the principal but the only debtor, and no payment by him or for him or in his interests or that of his estate could give rise to any claim to the bonds on the part of a person making such payment."

Royal Arcanum v. Cornelius, 198 Pa. 46, 50.

See also *Citizens' Trust Co. of Utica v. R. Prescott & Son, Inc.*, 227 N. Y. S. 514; *Hampton Loan & Exchange Bank v. Lightsey*, 152 S. E. 425.

Finally, statutes of limitation bar the right of subrogation. And if so, then equally contractual limitations ought to have the same effect.

> "• • • The case of *Lilly v. Dunn, supra*, and the case of *Arbogast v. Hays*, 98 Ind. 26, are strongly in

point. In the case last cited, Hays executed a note to the First National Bank of Winchester, with Arbogast as surety, for $900, and further secured the note by a mortgage on real estate executed to the bank. Arbogast paid $500 of the note, and, after the lapse of six years, brought suit against Hays to be subrogated to [fol. 70] the rights of the bank in the note and mortgage, and prayed a foreclosure of the mortgage, and sale of the mortgaged premises, to satisfy the amount he had paid as surety. The mortgage contained an express promise to pay. It was held that his cause of action was barred by the six-years statute of limitations. In speaking of the claim in that suit, the court said: 'Arbogast's claim for reimbursement rests simply and solely upon the implied obligation, which the mortgagors assumed, to indemnify him against the payment of any part of the note which he signed with them as their surety. * * * All the analogies deducible from limiting statutes lead us to the conclusion that a surety's right of subrogation to securities held by the creditor cannot be enforced after his claim against his principal has been barred by the statute of limitations.' * * *"

Kreider v. Isenbice, 23 N. E. 786, 788 (Supreme Court of Indiana).

After a review of the subject under discussion and a consideration of the points at issue, it is the view of the Advisory Committee that the provisions of the rail bill of lading with respect to times for the filing of claim and institution of suit are valid as against freight forwarders using the rail lines as a part of the through transportation, and must be asserted where such claims are not filed with the rail lines or suits instituted against them within the times prescribed in the rail bill of lading.

Very truly yours, (S.) George R. Allen. N.

[fol. 71] In District Court of the United States

Notice of Motion by D., L. & W. R. R. Co. and C., M., St. Paul & Pac. R. R. Co. for Judgment on the Pleadings

Sirs:

Please take notice that upon the summons, complaint, and answers of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the undersigned will move this court at a term for motions thereof to be held at the United States Court Building, Foley Square, New York City, the 27th day of August, 1946, at 10:30 A. M. thereof, for an order granting judgment on the pleadings in favor of said defendants, and for such other and further relief as may be just.

Dated: August 20, 1946.

Rowland L. Davis, Jr., Attorney for Defendants, D., L. & W. R. R. Co. and C. M., St. P. & Pac. R. R. Co., 140 Cedar Street, New York City.

To: Clark, Carr & Ellis, Attorneys for Plaintiff, 120 Broadway, New York City.

[fol. 72] In District Court of the United States

Plaintiff's Notice of Motion to Strike Defenses

Sirs:

Take notice that upon the summons, complaint and answer herein, the undersigned will move this court at a term for motions thereof to be held at the United States Court Building, Foley Square, New York City, the 27th day of August, 1946, at 10:30 A. M. thereof, for an order striking out the first and second affirmative defenses contained in the answer of the defendants, Delaware & Hudson Railroad Corporation; Pennsylvania Railroad Company; Scott M. Loftin and John W. Martin as trustees of the Florida East Coast Railway Company; Delaware, Lackawanna & Western Railroad Company; and Chicago, Milwaukee, St. Paul &

Pacific Railroad Company, as insufficient in law, and for such other and further relief as may be just.

Dated: August 21, 1946.

Clark, Carr & Ellis, Plaintiff's Attorneys.

Thomas L. Ennis, Esq., Attorney for Defendant, D. & H. R. R. Corp., Delaware & Hudson Building, Albany 1, N. Y.; Messrs. Bleakley, Platt & Walker, Attorneys for Defendants, Pennsylvania R. R. & Scott M. Loftin, 120 Broadway, New York City; Rowland L. Davis, Jr., Esq., Attorney for Defendants, Lackawanna and Milwaukee Railroads, 140 Cedar Street, New York City.

[fol. 73] In District Court of the United States

Answering Affidavit of B. H. Wettlaufer, Read in Opposition to Plaintiff's Motion.

State of New York,
County of New York, ss:

B. H. Wettlaufer, being duly sworn, deposes and says:

That he is and has been for many years last past the Freight Claim Agent of the defendant, The Delaware, Lackawanna and Western Railroad Company, hereinafter called the "Lackawanna," one of the defendants in the above-entitled action, and is thoroughly familiar with plaintiff's operation and the handling of plaintiff's shipments over the lines of the Lackawanna and its connecting carriers.

That deponent is familiar with this action, has read the complaint and amended answer, and also the affidavit of William J. H. McEntee in support of plaintiff's motion for summary judgment against some of the defendants.

Plaintiff is a freight forwarder subject to the provisions of Part IV of the Interstate Commerce Act. That in its operations plaintiff solicits from various shippers less-than-carload shipments, for handling of which plaintiff maintains in the principal cities of the United States certain facilities. Plaintiff itself operates no motor trucks. The shipper advises plaintiff that he has a shipment to make. The shipper may take the shipment to the plaintiff's facilities or he may request plaintiff to pick up said shipment at

his place of business. In the latter instance the plaintiff arranges for a local trucker to pick up said shipment and the local trucker issues to the shipper on behalf of plaintiff a [fol. 74] bill of lading showing the person from whom the shipment is picked up as the shipper, and the person to whom the shipment is to be ultimately delivered as the consignee. The trucker then takes the shipment to the Acme facility and turns over the shipment and the bill of lading to Acme. In the event that the shipper takes the shipment to the Acme facility, the bill of lading is issued directly by Acme to the shipper, the shipper being the consignor and the person to whom it is ultimately destined is shown as the consignee.

From the receiving facility the shipment may move to destination or to some intermediate point by two means. Acme may turn the shipment, with others constituting a truckload, over to an over-the-road common carrier by truck, who transports said truckload to a particular destination. Upon reaching such destination the over-the-road trucker delivers the truckload of merchandise to the plaintiff, which in turn, after sorting, delivers the shipments to a local trucker for delivery to the ultimate consignees. The plaintiff may, instead of delivering the shipment to an over-the-road trucker, deliver a carload lot of shipments to a rail carrier for transportation to a particular designated point. These shipments may be loaded into a railroad boxcar by the plaintiff or the rail carrier, and may be unloaded at destination by the rail carrier or by the plaintiff. In many instances after delivery at the rail destination a part of the carload shipment may be transported by an over-the-road trucker to another point and there distributed by a local trucker. After delivery of the shipment to the plaintiff at the rail destination, the plaintiff then makes delivery by means of local truckers operating in the locality.

In connection with the rail movement the Lackawanna issues to Acme upon receipt of a carload shipment the Uniform Straight Bill of Lading prescribed by the Interstate Commerce Commission and set forth in Consolidated [fol. 75] Freight Classification No. 16, which is the same Bill of Lading issued to all shippers. This bill of Lading shows the plaintiff as the shipper and the plaintiff as the consignee. The Lackawanna does not know the shipper or consignee of the individual shipments contained in said boxcar, nor the original origin nor final destination thereof.

In cases where the Lackawanna loads the shipments are checked to the car by an Acme lot number and label, and in cases where the Lackawanna unloads from the car the shipments are checked by an Acme lot number and label. In those cases where Acme both loads and unloads there is no railroad check made of the contents of the car, and the only information which the Railroad has in connection therewith is that furnished by Acme showing the weight and type of freight contained therein.

The charges which the Lackawanna makes for transporting carload shipments for the plaintiff are considerably less in amount than the aggregate charges would be if each of the individual units comprising such carload shipment were shipped as a less-than-carload shipment over defendant's rail line and separately rated. Plaintiff's charge to its shipper is higher than the rate which it pays the Railroad Company.

Except as amplified by this affidavit, plaintiff's operation is correctly described in the First Separate Defense in Lackawanna's amended answer.

Deponent is uninformed as to what type of Bill of Lading is issued by plaintiff, as in his dealings with the plaintiff the only Bill of Lading with which he is concerned is the rail Bill of Lading covering the rail movement. Deponent does believe that the Bill of Lading issued by plaintiff covers the movement from the shipper's place of business to the consignee's place of business, irrespective of whether the shipment moves entirely by truck or by truck, railroad and truck.

[fol. 76] It is deponent's belief that the issue in this action is not what the relationship is between the plaintiff and its shippers and consignees, but the relationship between the plaintiff and the defendant rail carriers under the rail Bill of Lading issued to plaintiff, wherein the plaintiff is shown as the shipper and also as the consignee. Deponent states that in his dealings with the plaintiff, both before and subsequent to the enactment of Part IV of the Interstate Commerce Act, plaintiff filed with deponent formal claims for loss, damage or injury to shipments occurring on the lines of the Lackawanna or in cases where the Lackawanna was the receiving or delivering carrier, and with such formal claim documents supporting

the same, and that if such claim was not filed within nine months, as required by the contract terms and conditions of the rail Bill of Lading, the claim was declined and the declination accepted by the plaintiff.

In so far as shipments moving over the Lackawanna are concerned, the rail Bill of Lading issued to plaintiff recites that the Lackawanna is the receiving carrier, and that Bill of Lading fixes the rights of the parties thereto for the movement covered thereby. It is not an intermediate Bill of Lading but an original Bill of Lading covering only the entire rail movement.

Liability as between common carriers for loss or damage occurring during transit exists only where the common carriers publish a joint through rate, that is, a rate which the carriers agree is compensatory for the movement involved and in which they each participate according to the services performed. Such rates are filed with and approved by the Interstate Commerce Commission. No railroad publishes a joint through rate with the plaintiff, and there is no authorization or permission therefor in the Interstate Commerce Act or any other law, and the Interstate Commerce Commission has so held.

[fol. 77] It has been recognized by plaintiff in claims filed with the Lackawanna that a rail carrier is only responsible to the plaintiff for loss, damage or injury occurring while the shipment is in its possession, and is not responsible for loss, damage or injury occurring prior to delivery to the rail carrier or subsequent to the time the shipment is delivered to Acme. In many cases of claims filed by Acme there is a question as to where the loss, damage or injury occurred.

All shipments by railroad must be made under the terms and provisions of the Uniform Bill of Lading prescribed by the Interstate Commerce Commission and set forth in Consolidated Freight Classification No. 16, and to allow Acme, as a rail shipper shipping carload shipments on said Uniform Bill of Lading, to have more than nine months in which to file a claim with the rail carrier for loss, damage or injury, whereas other shippers must file their claim within nine months as prescribed in said Uniform Bill of Lading, would constitute the giving to Acme of a preference or advantage not enjoyed by other shippers, contrary to the provisions of the Interstate Commerce Act.

As between carriers who publish a joint through rate the settlement of claims is in accordance with Principles and Practices for the Investigation and Disposition of Freight Claims and Freight Claim Rules. The purpose of Principles and Practices and Freight Claim Rules was to provide a uniform treatment of freight claims by carriers publishing a joint through rate, so that each claimant would be treated alike and no preference given one claimant over another by reason of a different method of investigation or disposition of freight claims. Furthermore, it was the intent of Principles and Practices and Freight Claim Rules to provide a stringent check on the payment of unlawful claims whereby one shipper would obtain a rebate to the disadvantage of another.

(Sworn to by B. H. Wettlaufer, August 21, 1946.)

[fol. 78] In District Court of the United States

Stipulation

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant Wabash Railroad Company in the above-entitled action, that the plaintiff's motion returnable on the 27th day of August, 1946, for an order granting summary judgment against certain defendants for the relief demanded in the complaint, and that the plaintiff's motion also returnable on the 27th day of August, 1946, for an order striking out the first and second affirmative defenses contained in the answer of certain of the defendants be, and they hereby are extended to include the defendant Wabash Railroad Company as an additional defendant.

Dated: August 26, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff; Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company.

[fol. 79] In District Court of the United States

Answering Affidavit of H. W. Kerns, Read in Opposition to Plaintiff's Motions

State of New York,
County of New York, ss:

H. W. Kerns being duly sworn, deposes and says that he is and has been for many years last past the Assistant Freight Claim Agent of the defendant Pennsylvania Railroad Company, one of the defendants in the above entitled action and is thoroughly familiar with plaintiff's operation and handling of plaintiff's shipments over the lines of the Pennsylvania Railroad and its connecting carriers.

Deponent is also and has been for the past two years a member of the Committee on Freight Claim Rules of the Freight Claim Division of the Association of American Railroads.

There is submitted herewith and made a part hereof as Exhibit A, copy of Rules of Order, Principles and Practices, Freight Claim Rules of the Freight Claim Division of the Association of American Railroads 1943 Edition, with 1944 and 1945 Supplements thereto, the same being those in effect presently.

(Sworn to by H. W. Kerns, Aug. 27, 1946.)

Exhibit A Annexed to Foregoing Affidavit of H. W. Kerns

Copy of Rules of Order, etc., of the Freight Claim Division.

To be submitted on the argument of the appeal.

[fol. 80] In District Court of the United States

Answering Affidavit of William C. Morrow, Read in Opposition to Plaintiff's Motion

State of New York,
County of New York, ss:

William C. Morrow being duly sworn, deposes and says:

1. That he is and for many years past has been employed in the office of the auditor of freight traffic of the defendant,

the Pennsylvania Railroad Company, and is now and for several years has been the Chief Clerk of the Rate and Revision Division of that office.

2. Among deponent's various duties is the supervision of rates and their revisions, as presented to the auditor of freight traffic. In connection with this work deponent must be familiar with and is constantly referring to the effective consolidated freight classification, tariffs, exceptions and supplements thereto of the defendants and other rail carriers. Attached hereto are:

(a) Consolidated Freight Classifications numbers 14, 15, 16 and 17 which were successively effective during the period between December 31, 1940 and the present date.

(b) Complete set of Supplements to Consolidated Classifications numbers 16 and 17 and Supplement number 14 to Consolidated Classification number 15.

(c) Exceptions to the Official Classification number 17.

(d) Freight tariffs covering car demurrage rules and charges effective between December 31, 1940 and the present date.

[fol. 81] (e) Pennsylvania Railroad local and joint freight tariff of rules and charges governing diversion or reconsignment.

(Sworn to by William C. Morrow, August 27, 1946.)

NOTE: Exhibits annexed are to be submitted to the Court upon the argument of the appeal.

IN DISTRICT COURT OF THE UNITED STATES

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendants herein that the notice of motion of the defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company

for judgment on the pleadings herein, dated August 20, 1946, and returnable on August 27, 1946, be and the same is hereby amended, *nunc pro tunc*, to include, as moving parties therein, the defendants Delaware & Hudson Railroad Corporation, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, Pennsylvania Railroad Company and Wabash Railroad Company; and it is

Further stipulated and agreed that the aforesaid notice of motion be and the same hereby is further amended, *nunc pro tunc*, so as to include therein a motion for summary judgment herein on behalf of all of the defendants; and it is

[fol. 82] Further stipulated and agreed that the decision of the Court herein, dated April 3, 1947 and filed herein, is to be considered as the decision on the motion for judgment on the pleadings by the defendants, as so amended, *nunc pro tunc*, and as a decision on a joint motion of the defendants for summary judgment herein; and that any order to be entered thereon shall provide for judgment against the plaintiff and in favor of all the defendants in this action without costs; and it is

Further stipulated and agreed that but one judgment dismissing the complaint without costs shall be entered on behalf of all defendants herein.

Dated, New York, May 19, 1947.

Clark, Carr & Ellis, Attorneys for Plaintiff; Rowland L. Davis, Jr., Attorney for Defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company; Bleakley, Platt & Walker, Attorneys for Defendants Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company and Pennsylvania Railroad Company; Thomas L. Ennis, Attorney for Defendant Delaware & Hudson Railroad Corporation; Pierce & Greer, Attorneys for Defendant Wabash Railroad Company.

So ordered 5/19/47. John Bright, U. S. D. C. J.

[fol. 83] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION

BRIGHT, D. J.

Clark, Carr & Ellis, Esqs., Attorneys for Plaintiff, 120 Broadway, New York City; Paul A. Crouch, Esq., of Counsel.

Rowland L. Davis, Jr., Esq., Attorney for Defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and The Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt & Walker, Esqs., Attorneys for The Pennsylvania Railroad Company: Joseph Walker, Esq., Roswell P. C. May, Esq., Dennis P. Donovan, Esq., of Counsel.

Thomas L. Ennis, Esq., Attorney for The Delaware and Hudson Railroad Corporation; Thomas L. Ennis, Esq., Joseph Rosch, Esq., John H. English, Esq., of Counsel.

Bleakley, Platt & Walker, Esqs., Attorneys for Defendants Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, 120 Broadway, New York 5, N. Y.; Dennis P. Donovan, Esq., of Counsel.

Pierce & Greer, Esqs., Attorneys for Defendant Wabash Railroad Company, 40 Wall Street, New York City: H. Bruce Campbell, Esq., of Counsel.

Plaintiff is a freight forwarder, and its business is controlled by the provisions of Part IV of the Interstate Commerce Act (49 U.S.C. §§1001 *et seq.*). Defendants are common carriers by rail, and their business is controlled by Part I of the same act (§§1 *et seq.*). They issue to plaintiff, when [fol. 84] the latter's forwarding of car lots of freight require it, uniform bills of lading, a part of the tariff required to be filed, which contain the following clause relating to the liability of defendants for loss or damage:

> "Sec. 2.(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury of delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of

failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

In such uniform bills of lading plaintiff is designated as the shipper as well as the consignee. Claiming that it is, in fact, the "receiving or delivering carrier" named in the clause quoted, and that each defendant, under any bill of lading issued by it, is a "connecting carrier" of plaintiff, it contends that it is not required to file a claim within the nine months mentioned, if, within that period, the shipper, who has entrusted its freight to plaintiff for transportation in interstate commerce, files such claim with plaintiff.

[fol. 85] As the defendants deny such contention, and have rejected claims filed by plaintiff with them after the expiration of the nine months period, plaintiff seeks in this action a declaratory judgment that, as such freight forwarder, it is the "receiving carrier" within the meaning of the uniform bill of lading, that written notice of claim to it within the nine months period satisfies the provision quoted, and, after receipt thereof, plaintiff, by subrogation to the claims of its shippers sustaining loss or damage in the transportation service of defendants as plaintiff's connecting carriers, is entitled to recover from defendants amounts paid by it to its shippers.

Plaintiff, to sustain its contention, relies on section 20(11) and (12) of Part I of the Act, which, so far as material, provide:

> "§20, par. (11) *Liability of initial carrier for loss: limitation of liability: notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation" (in interstate commerce) • • • "shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it.

or by any common carrier, railroad or transportation company to which such property may be delivered or over whose lines adjacent foreign country when transported on a through bill of lading" • • •.

"§20, par. (12) *Recovery by initial carrier from connecting carrier.* The common carrier, railroad or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been [fol. 86] sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

Section 1013 of Part IV of the act, relating to freight forwarders, reads:

"§1013. *Bills of lading and delivery of property.* The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20 (11) and (12). When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and

receipted for on the delivery receipt, of the freight forwarder."

[fol. 87] It urges, further, that its contention is sustained by the case of *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, and kindred cases.

Defendants have joined issue on the complaint, and in each of their answers have pleaded identical defenses. The first is that plaintiff is a freight forwarder, that its method of doing business is solely in that category, that as to each defendant, plaintiff is a shipper, that defendant does not receive shipments from plaintiff as an initial carrier or under the bill of lading issued by it to its shipper; and that under the facts and circumstances pleaded, and on these motions now undisputed, the bill of lading issued by each defendant would not be void under section 20 (11) and (12) above quoted, alone measures the liability of each defendant and its connecting rail carriers, and plaintiff must comply with the provision in the section quoted at the beginning of this opinion.

The second defense is that, under the facts pleaded in the first defense, assuming plaintiff has the right under section 413 above quoted to be subrogated and to recover over, such right has been modified and limited by that portion quoted from and contained in, any bill of lading issued to plaintiff by any of the defendants, and must file claim within the nine months therein specified as a condition precedent to any recovery.

Plaintiff now moves upon the pleadings and the affidavit of its vice president for summary judgment against the defendants Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Delaware, Lackawanna & Western Railroad Company and Wabash Railroad Company; and also, upon the pleadings, to strike out the first and second defenses mentioned. The defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, also ask for an order granting judgment in their favor on the pleadings.

[fol. 88] The following facts appear without dispute:

Since the enactment of Part IV of the Interstate Commerce Act in 1942, plaintiff has had upward of sixty claims against rail carriers in all parts of the country, in which notice of claim was timely upon it but in which failure to give such notice to the responsible rail carrier within the

nine months has been the sole or principal basis of the declination by such rail carrier of such claims. Those claims were, for the most part, for limited amounts and could not be, for jurisdictional reasons, tried in one place, and without due expense could not be tried separately. The only issue at law in most of those cases was whether or not the claim had been presented in time.

The business of the plaintiff as a freight forwarder subject to the provisions of Part IV consists, in part, of holding itself out to provide transportation of property in interstate commerce. It solicits and receives from various shippers at various assembly points less than carload shipments of freight, for the handling of which plaintiff maintains facilities in the principal cities of the United States. It operates no motor trucks. In the course of its undertaking of assembling and consolidating shipments, it performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, assumes responsibility for the transportation of such property from receipt to destination, and utilizes for the whole or part of that transportation the service of carriers which are subject to Parts I, II or III of the Interstate Commerce Act. The shipper may take the shipment to plaintiff's facilities or he may request plaintiff to pick it up at his place of business. In the latter instance, plaintiff arranges for a local trucker to pick up the shipment, and the local trucker issues to the shipper, on behalf of plaintiff, a bill of lading showing in part to whom and where the shipment is to be [fol. 89] ultimately delivered. The trucker takes the shipment to plaintiff's facility and turns it over with the bill of lading to the plaintiff. If the shipper takes the shipment to plaintiff directly, the bill of lading is issued by plaintiff to the shipper, the shipper being the consignor and the person to whom it is ultimately destined, the consignee. From the receiving facility, the shipment may move to destination or to some intermediate point by two means.

Plaintiff may turn the shipment, with others constituting a truck load, over to a common carrier by truck, who transports the truck load to a particular destination, where it is delivered to the plaintiff, which, in turn, after sorting, delivers the shipments to a local trucker for delivery to the ultimate consignees. Or plaintiff may, instead of delivering the shipment to an over-the-road trucker, deliver

a carload lot of shipments to a rail carrier for transportation to a particular designated point. These shipments may be loaded into a railroad box car by plaintiff or the rail carrier, and may be unloaded at destination by the rail carrier or plaintiff. In many instances, after delivery at the rail destination, a part of the carload shipment may be transported by a trucker to another point and there distributed by a local trucker employed by plaintiff. Or, after delivery of the shipment to plaintiff at the rail destination, the plaintiff may make delivery by means of local truckers operating in the locality.

At the assembly points, individual less-than-carload shipments are sorted, assembled and consolidated by plaintiff into trucklot quantities for further highway transportation, or railroad carlot quantities for rail transportation. The carlot quantities are then delivered to one of the defendants as original single carlot shipments of mixed merchandise for transportation by such defendant and its connecting rail carriers pursuant to the terms of a uniform rail bill of lading issued by the initial rail carrier, in which plaintiff is named both as consignor and consignee and [fol. 90] by which such shipments are consigned to plaintiff at designated tariff rail designations on the line of such defendant or the connecting rail carrier, and for delivery as single carload shipments to plaintiff at such designated destination. Such carload shipments are not consigned to the consignee or destinations named in plaintiff's or the highway motor common carrier's individual bill of lading previously issued for the component parts of such carload shipments. The shipments are not tendered to the railroad companies for transportation upon a through route, if any, specified in the bills of lading previously issued by plaintiff upon less than carload shipments or on the several parts of said carload shipments. No rail route is specified in the bills of lading issued by plaintiff or its truckmen or motor common carriers.

Upon each of the carload shipments delivered by plaintiff to the railroad companies, each railroad issues a bill of lading, prescribed for use by rail carriers by the Interstate Commerce Commission, being the same issued to all shippers. The railroads do not know the shipper or consignee of the individual shipments contained in the box car and the bill of lading issued by it does not show them either as consignor or consignee, nor does it show the destination of the shipment of any of them.

The railroad transportation of the carload shipments delivered to it by plaintiff is performed solely pursuant to railroad classifications and tariffs filed with the Interstate Commerce Commission and applicable to all shippers of freight alike. They include Rules 1, 7 and 14. These classifications and tariffs provide for joint rates and through routes in rail transportation from the points where the carload shipments are received by rail carriers to the rail destinations, but only between initial connecting and delivering rail carriers. They do not provide for joint rates or through routes as between any rail carrier and any freight forwarder.

[fol. 91] The charges which the railroad make for transporting carload shipments for plaintiff are considerably less in amount than the aggregate charges would be if each of the individual shipments was shipped direct by the original shipper as a less than carload shipment over defendant's rail line. Plaintiff's charge to its shipper is higher than the rate which it pays the railroad company under a carlot tariff; its profit as a freight forwarder arises from the spread between the cheaper carlot freight rate and the higher less-than-carlot tariff.

Rule 1, referred to above provides in substance that when property is transported subject to the provisions of the official classifications, the use of the uniform bill of lading is required; that the consignor may have the option of shipping the property subject to such terms and conditions, or under liability imposed by common law and federal and state statutes, and he may have a limited liability service. Property will be carried at the reduced rate specified if shipped subject to the terms of the uniform bill of lading; but if it is not, the rate charged therefor will be 10% higher. Rule 7 states that, unless otherwise provided, the name of only one shipper, one consignee and one destination shall appear on a shipping order or bill of lading. And Rule 14 states that carload rates apply only when a carload of freight is shipped from one station in one car, in one calendar day, by one shipper for delivery to one consignee at one destination, and is loaded by the shipper and unloaded by the consignee; and only one bill of lading and one freight bill shall be issued for such carlot shipment. Provision is made for loading and unloading by the carrier, for split deliveries (meaning delivery to more than one party), and

for stop over privileges to complete loading or to partly unload while enroute.

For the services performed by plaintiff for the original consignor or shipper, for whom plaintiff or a participating [fol. 92] highway motor common carrier has issued a bill of lading, plaintiff collects a charge pursuant to a filed tariff, and that tariff charge is divided between plaintiff and the highway motor common carrier participating when the services of such motor carrier are utilized by plaintiff; and none of the railroads receive from plaintiff any portion of such charge. There is no authorization or permission in the Interstate Commerce Act, or otherwise, permitting a railroad as a common carrier to enter into any agreement with plaintiff to perform transportation services under a joint rate or through route, or to engage in any practice different from that accorded all other shippers or receivers of freight under the railroad's published and filed tariffs, classifications &c.

Plaintiff gives as the reason for its present complaint and motion that in forwarder transportation delivery to rail carriers follows closely upon delivery to it, but sometime necessarily elapses between receipt by it of its shipper's claim and its refiling upon the connecting rail carrier; and that a certain number of instances are bound to occur where notice to the plaintiff is timely but it does not permit notice within the nine months to the connecting rail carrier.

The question which seems decisive is whether, because of § 20 (11) and (12), plaintiff is permitted to step out of its conceded status as freight forwarder and become, for the purpose of recouping claims paid by it to its shippers, an "initial carrier," made liable by §20(11) to shippers for losses occurring upon any "connecting carriers" line, and by subdivision (12) of that section permitted to recover over against such "connecting carriers" responsible for the loss.

Freight forwarders, until now at least, have always been held by the courts to be "shippers." *Interstate Commerce Commission v. Delaware L. & W. R. Co.*, 220 U. S. 235, *Northern Railway Co. v. O'Connor*, 232 U. S. 508, *Lehigh* [fol. 93] *Valley R. Co. v. United States*, 243 U. S. 144. And plaintiff's method of business in the past has recognized that to be so. In all bills of lading issued to it by the railroads, it has been designated as "shipper."

When this plaintiff attempted to obtain a certificate of convenience and necessity as a common carrier by motor vehicle from the Interstate Commerce Commission, it was refused; and when it sought to set aside that determination in this court, it was unsuccessful. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968, aff'd 309 U. S. 638. It was there held that plaintiff was a freight forwarder and a shipper, and had not been engaged as a common carrier by motor vehicle nor as a contract carrier within the purview of the Motor Carrier Act, now Part II of the Interstate Commerce Act. It is true that that case was decided before the present Part IV was enacted. But as I read the present statute relating to freight forwarders, it has not changed materially the factual situation or the law as it existed when that case was decided. As appears above from the undisputed facts before me, the method of doing business is substantially the same now as that related in the opinion of Judge A. N. Hand in that case. The affirmance in the Supreme Court was without opinion other than the citation of the three cases at the head of this paragraph.

I think the question must be answered against plaintiff's contention.

The Interstate Commerce Act was originally enacted on February 4, 1887, and applied to interstate transportation, (1) of passengers or property by rail, or partly by rail and partly by water, (2) of oil or other commodity, except water and gas, by pipe line, railroad or water and (3) the transmission of intelligence by wire or wireless. That statute, with its amendments, are now Part I of the present Act. [fol. 94] Part II was added in 1935 (§§301 *et seq.*), and applies to transportation of passengers and property in interstate commerce by motor vehicle carriers. Such carriers are permitted by §316(c) to establish reasonable through routes and joint rates with common carriers by railroad, express and water, and to make division thereof among each. By §319, it was provided, without any qualifying clauses as appear in §1013, that the provisions of §20 (11) and (12) shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

Part III was added in 1940 (§§ 901 *et seq.*), and applies to common carriers or contract carriers in interstate commerce by water, or partly by water and partly by railroad

and motor vehicle. Common carriers by water are permitted by §905(b) to establish reasonable through routes and rates with common carriers by railroad and by motor vehicles and to make division thereof among each. The applicability of § 20 (11) and (12) to carriers in this part does not seem to have been enacted.

Part IV, relating to freight forwarders, was added in 1942. By §1002 it defines the term as meaning any person which (other than as a carrier subject to parts I, II and III) holds itself out to transport or provide transportation of property for compensation in interstate commerce, and which, in the course of its undertaking assembles and consolidates, or provides for assembling and consolidating shipments of such property, and performs and provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, assumes responsibility for the transportation from point of receipt to point of destination, and utilizes for the whole or part of such transportation the service of carriers subject to the three parts mentioned. By §1004 it is made unlawful for any [fol. 95] carrier, subject to Parts I, II and III, to make, give or cause any undue or unreasonable preference or advantage to any freight forwarder, or to subject such freight forwarder to any undue prejudice or disadvantage; but freight forwarders are not prohibited from entering into an agreement with any other freight forwarder for the joint loading of traffic between points in transportation. While under §1005 freight forwarders are required to file tariffs showing their rates and charges for services, there is no clause permitting them to establish joint or through rates in conjunction with rail carriers. By §1009 (a) (1) freight forwarders are authorized to utilize the services and instrumentalities of common carriers by motor vehicle subject to Part II in furtherance of the national transportation policy; and by subdivision (b) of that section freight forwarders and common carriers by motor vehicle may operate under joint rates or charges.

It is to be noted that nowhere in Part IV are freight forwarders designated as carriers. The only time they are designated other than as freight forwarders is in the §1013, where they are, for certain purposes, deemed both a receiving and delivering transportation company. They were at one time named as "carrier" in subdivision (b) of §1017, but by an amendment on August 7, 1942, less

than three months after Part IV was added, that was corrected and "freight forwarder" was substituted for "carrier" wherever the latter word appeared.

They are not carriers and cannot be. The Interstate Commerce Act clearly maintains the distinction between common carriers by rail, by water, and by motor vehicle, and the three are separate and distinct from freight forwarders. All of the carriers in Parts I, II and III are permitted to promulgate through routes and rates one with the other; not so the freight forwarder. It is permitted to avail itself of the services of the other three classes in the performance of such transportation as it [fol. 96] may contract to furnish, but it cannot engage in that class of transportation specifically allocated to the three classes of carriers.

And I do not think §1013 changes the situation. It is to be observed that while it provides that §20 (11) and (12) shall apply to freight forwarders, it is only "in the case of service subject to this chapter." And the freight forwarder shall be deemed "both the receiving and delivering" transportation for the purpose of such §20 (11) and (12).

§20 (11) only applies in carriage by rail when the property is "transported on a through bill of lading." The obvious purpose of that section was to make it convenient for through shippers, who had sustained a loss, to sue to recover; he could not know in many instances where the loss had occurred or which one of the connecting carriers caused it, and so Congress made the initial carrier, which received the through shipment responsible on the theory that all connecting carriers were agents of the initial carrier engaged in carrying out the through transportation contracted for with the initial carrier; and by subdivision (12) authorized a recovery over by the initial carrier against the connecting carrier who caused the loss. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 200.

The activities of freight forwarders are confined and regulated by Part IV. Section 1013 obviously confines the application of §20 (11) and (12) to the "case of service subject to this chapter," and in my opinion, does not contemplate anything further.

The bills of lading issued to plaintiff by the railroads are not the through bills of lading mentioned in section

20 (11), and because of the very nature of plaintiff's business, cannot be, for the shipments made by rail are from one point where plaintiff has collecting and segregating facilities to another point where the same process is gone [fol. 97] through. One less than carload lot may be deliverable in San Francisco, but it may be changed and reloaded and rerouted at several points by plaintiff in order to accomplish shipments of carload lots. In each of the instances where one carload is partly unloaded and the less than carload lots delivered by plaintiff to the consignees, other shipments are loaded to take the place of those removed and new rail bills of lading for carload lots obtained. The entire practice of plaintiff is so at variance with that in which the railroads are permitted to indulge as to make it clear that it was never the purpose of Congress to establish plaintiff as an initial carrier and thus relieve it from the necessity of complying with the claim clause quoted from the bill of lading. Among others there would seem to be these additional considerations:

1. The property tendered to plaintiff for which it issues its through bill of lading is not the property tendered to defendant. Plaintiff receives a less than carload lot. Defendants receive a carload shipment, and there must be a new bill of lading. It could not be otherwise, for if the shipment received by plaintiff were tendered to defendant railroad, the freight imposed would be a less-than-carload rate; it could not be reshipped by the railroad at carload rates without violating the law. 49 U. S. C. §2 and §1004 (c). Even were plaintiff a carrier, the railroads could not do this. *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 225 U. S. 326, 346.

2. There was also a new consideration for the rail bill of lading. The rate paid by plaintiff's shipper was based on a less than carload shipment, whereas the rate which the defendants were bound to charge was cheaper, based on a carload shipment.

3. The defendants could not ship under the bill of lading issued by the plaintiff for the law does not permit joint rates or routes between freight forwarders and rail common [fol. 98] carriers. To do so, would violate the railroads filed tariffs and classifications, and thus again, the law.

4. The very purpose which Congress had in mind in its enactment of §20 (11) and (12) is not present here. Plain-

tiff's shippers contract with it for complete receipt, transportation and delivery. They do not have to know by what means, or by what carriers, the transportation is to be had; that is not included in the bill of lading issued by plaintiff, and the shippers have no interest in it. Plaintiff is always available for suit and for the purpose of filing claims, so that the considerations which existed when the section mentioned was enacted do not exist and cannot exist as between plaintiff and its shippers. The entire through transportation is agreed to be made by one entity —the plaintiff.

5. The bill of lading issued by plaintiff, if it be the basis of a right of action, would be contradictory to that issued by the rail carrier, because it would specify different consignors, consignees, destinations, rates, and merchandise.

6. There could be no general rate between plaintiff and the rail carriers covering the transportation from the original shipper to the ultimate consignee. Plaintiff could not share in the rate under the rail carrier bill of lading, and the railroad could not share in the rate under plaintiff's bill of lading.

7. There would be no privity of contract between the railroad and the actual shipper. Plaintiff's shipper could sue only the plaintiff, and having no claim under the bill of lading issued to plaintiff by the rail carrier, there would be no claim to which plaintiff could be subrogated.

8. Plaintiff's contention would make the railroad subject to the terms of a bill of lading prepared by plain-[fol. 99] tiff which had never been filed as any part of rail tariffs, classifications, etc., in the preparation of which it had had no part, and over which it had no control; and which, in fact, has not been authorized either by statute or by the Interstate Commerce Commission as between railroads and freight forwarders.

9. Railroads are prohibited from carrying the merchandise in the form received by plaintiff at the rate charged by plaintiff; for if tendered to the railroads by the real shipper, the railroads would have to charge less than the carload rates. If plaintiff's bill of lading were complied with and shipments made by the railroads under it at carload rates, there would be discrimination and violation of

the Interstate Commerce Act. The rail carriers would thus be held liable under plaintiff's bill of lading reciting a through rate which was unlawful.

10. Railroads could not be "connecting carriers" with plaintiff, because they do not transport on the same contract as between plaintiff and its shipper, and could not legally do so. For the same reason, they are not through carriers on through bills of lading.

11. Plaintiff's practice heretofore is entirely inconsistent with its present contention. It could not transport by rail carriers under the bill of lading issued by it to its shippers. It has, therefore, in each instance obtained a new rail bill of lading. Thus for many years it has conceded that it needs a new transportation contract in order not only to carry out its agreement with its shipper but in order to carry on its business and make money. Its only real reason for this present contention apparently is that it wants more time to file claims than nine months, which seems to me to be a fairly reasonable length of time.

[fol. 100] 12. The obvious purpose of Congress was to make the provisions of §20(11) and (12) apply only to plaintiff as the receiving and delivering agent and to those common carriers by motor vehicle with whom it contracts and with whom it can make and divide joint rates and routes (as it cannot be with rail common carriers). I think plaintiff is precluded from its present contention by the definition of a freight forwarder contained in §1002(5)—"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapters 1, 8 or 12 of this title) holds itself out to the general public to transport."

13. Finally, Congressman Wolverton of the House Committee in charge of the bill, later Part IV, stated to the House on October 23, 1941 (Cong. Rec. Vol. 87, Part 8, pgs. 8216 *et seq.*) as follows:

> "In some respects the report (House Report No. 1172) which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to members of the committee or subcommittee, and, therefore, it may not be out of place to include in these remarks some further explanations which may be helpful to the members in their considera-

tion of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended * * *.

"In its explanation of section 413, (§1013 49 U. S. C.) the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person [fol. 101] to which such shipper is entitled to look for recovery of damages, and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company.'. If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right of subrogation under section 20 (12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved."

The case of *Missouri, Kansas & Texas Railroad Co.* v. *Ward*, 244 U. S. 383, upon which much stress is laid by plaintiff in its brief, does not seem to me to be controlling. There cattle were delivered to the Houston Railroad for transportation by it to Elgin, Texas, and other connecting lines of the M.K.T. of Texas and the M.K.T. Railway Co. to Winona, Oklahoma. The Houston Company issued a through bill of lading and charged a through rate, which was paid. The cattle were damaged enroute and suit was brought. It appeared that at Elgin, the M.K.T. of Texas issued a second bill of lading which required the filing of claims within thirty days. The original bill controlled the shipment and liability, and as the defendants were bound to transport the cattle at the rate and upon the terms named in the original bill, the acceptance by the shipper of a second bill was without consideration and void, it not

appearing that any different rate had been contracted for by the second than already in the first.

[fol. 102] The differences between that case and this are: (1) Plaintiff here is not a carrier by rail, or even a carrier; (2) the identical shipment delivered by Ward to the initial carrier was the identical shipment carried by the connecting lines; (3) there the rail bill of lading was delivered to the original shipper; (4) there the original shipper charged and was paid a through rail rate; (5) there the tender to the second carrier for transportation was of the same property and on the same route as to the initial carrier; (6) there the consignee was the same on the two bills of lading; and (7) there the original though rate was to be divided in accordance with law among the several carriers who participated in the transportation; here the rate charged by plaintiff to the original shipper is either pocketed entirely by it or divided with some motor carrier; it could not be divided with the rail carrier.

It follows that the plaintiff's motions must be denied.

The motion of the two defendants for judgment on the pleadings presents a different question. It is obviously made under Rule 12(c) and, upon such a motion, I must accept as true the facts properly pleaded in the complaint. Reading its allegations with the Interstate Commerce Act, as I have construed it above, the complaint fails to state a claim upon which a recovery may be had. Certainly with all of the facts shown by the motions for summary judgment before the court, all of the motions having been argued and submitted simultaneously, this motion can be treated as one for summary judgment for the two moving defendants and either as such, or as a motion in Rule 12(c), should be and is granted. *Palmer* v. *Palmer*, 31 F. Suppl. 861, 863; *Friedman* v. *Washburn Co.*, 145 F.(2) 715, 717; *Moore's Federal Practice*, vol. 1, page 651.

Settle orders on notice.

Dated: April 3, 1947.

John Bright, United States District Judge.

[fol. 103] In District Court of the United States, Southern District of New York

Order, Dated June 3, 1947, Appealed From

Plaintiff herein having, on August 17, 1946, served a notice of motion dated August 16, 1946, with affidavit of William J. H. McEntee sworn to August 16, 1946, and letter dated March 16, 1946, from George R. Allen to C. H. Dietrich attached, on the defendants, Wabash Railroad Company, Delaware, Lackawanna & Western Railroad Company, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for an order against said defendants granting summary judgment upon the summons and complaint and the answers of said defendants for the relief demanded in the complaint; and plaintiff herein having on August 21, 1946, served a notice of motion dated August 21, 1946, on the defendants, Delaware & Hudson Railroad Corporation, Pennsylvania Railroad Company, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for an order, upon the summons, complaint and answer, striking out the first and second affirmative defenses contained in the answers of the defendants Delaware & Hudson Railroad Corporation, Pennsylvania Railroad Company, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company to plaintiff's amended complaint, and the first and second affirmative defenses contained in the amended answers of the defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company to plaintiff's amended complaint on the grounds that said defenses were insufficient in law; [fol. 104] and by stipulation dated August 26, 1946, the plaintiff's motion for summary judgment and for striking out the first and second affirmative defenses aforementioned having been amended to include the defendant, Wabash Railroad Company; and the defendants Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company having, on August 20, 1946, served a notice of motion dated August 20, 1946, upon the plaintiff for an order granting judgment on the pleadings in favor of said defendants and

for such other and further relief as may be just; and said notice of motion, dated August 20, 1946, having by stipulation dated May 19, 1947, been amended *nunc pro tunc* to include, as moving parties therein the defendants Delaware & Hudson Railroad Corporation, Scott M. Loftin and John W. Martin as Trustees of the Florida East Coast Railway Company, the Pennsylvania Railroad Company and the Wabash Railway Company; and said stipulation dated May 19, 1947, having further amended the said notice of motion dated August 20, 1947, so as to include therein, *nunc pro tunc*, a motion for summary judgment on behalf of all the defendants herein; and said stipulation having further provided that the decision of the Court herein, dated April 30, 1947, and filed herein shall be considered as the decision on the motion for judgment on the pleadings by the defendants, as so amended *nunc pro tunc*, and as a decision on a joint motion of all the defendants for summary judgment herein; and it having been further stipulated that any order to be entered thereon should provide for judgment against the plaintiff and in favor of all the defendants in this action, without costs, and that only one such judgment shall be entered on behalf of all defendants; the Court having by order allowed said stipulation and the same having been duly filed herein on May 20, 1947; and said motions, amended as aforesaid, [fol. 105] having regularly come on to be heard before this Court on the 27th day of August, 1946;

Now on reading plaintiff's complaint; the stipulation dated June 13, 1946; plaintiff's amended complaint; the stipulation dated September 6, 1946, further amending plaintiff's amended complaint; the answers and amended answers of the respective defendants to said complaint and to said amended complaint; plaintiff's notice of motion dated August 16, 1946, and the affidavit of William J. H. McEntee sworn to August 16, 1946, and letter dated March 16, 1946, from George R. Allen to C. H. Dietrich attached thereto in support of said motion; plaintiff's notice of motion dated August 21, 1946; the stipulation dated August 26, 1946, making Wabash Railroad Company a party to said motions; the affidavit of B. H. Wettlaufer, sworn to August 21, 1946; the affidavit of William C. Morrow, sworn to August 27, 1946, and the exhibits submitted therewith, *i.e.*, (a) Consolidated Freight Classification Nos. 14, 15, 16 and 17, (b) supplements thereto,

(c) exceptions to Classification No. 17, (d) freight tariffs covering car demurrage rules and charges, (e) Pennsylvania Railroad local and joint freight tariffs of rules and charges governing diversions or reconsignments; the affidavit of H. W. Kerns, sworn to August 27, 1946, and the exhibits submitted therewith, *i. e.*, the Rules of Order, Principles and Practices of the Freight Claim Division of the Association of American Railroads and the 1944 and 1945 supplements thereto; all in opposition to plaintiff's said motions; and after reading the notice of motion of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, dated August 20, 1946, for an order granting judgment on the pleadings in favor of said defendants and for such other and further relief as may be just; and after reading plaintiff's interrogatories addressed to the defendants, Wabash Railroad [fol. 106] Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, dated August 16, 1946, and the answers of said defendants to said interrogatories dated August 22, 1946; and after hearing Clark, Carr & Ellis, Esqs., attorneys for the plaintiff, by Paul A. Crouch, Esq., of Counsel, in support of plaintiff's motions for summary judgment and to strike out defendants' first and second affirmative defenses as insufficient in law, and in opposition to the motion of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for judgment on the pleadings and for such other and further relief as may be just; and after hearing Rowland L. Davis, Jr., Esq., attorney for the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in opposition to plaintiff's said motions and in support of the motion of the defendants' Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for judgment on the pleadings and for such other and further relief as may be just; and after hearing Bleakley, Platt & Walker, Esqs., attorneys for the defendants, Pennsylvania Railroad Company and Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, by Joseph Walker, Esq., Roswell P. C. May, Esq., and Den-

nis P. Donovan, Esq., of Counsel, Pierce & Greer, Esqs., attorneys for the defendant, Wabash Railroad Company, by H. Brua Campbell, Esq., of Counsel, Thomas L. Ennis, Esq., attorney for the defendant, Delaware & Hudson Railroad Corporation, by Joseph Rosch, Esq., and John H. English, Esq., of Counsel, all in opposition to plaintiff's said motions; and due consideration having been had thereon and the Court having rendered and filed its written opinion and decision on April 3, 1947, denying [fol. 107] plaintiff's said motions and granting the motion of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and after reading the aforesaid stipulation dated May 19, 1947.

Now, on motion of the attorneys for the defendants, it is

Ordered that the motions of the plaintiff be and each of them hereby is in all respects denied; and it is

Further Ordered that the motions of the defendants be and they are hereby granted, and the clerk of this Court is hereby authorized and directed to enter one judgment dismissing the complaint herein as against the defendants, without costs.

Dated, New York, June 3, 1947.

Enter, John Bright, U. S. D. J.

[fol. 108] In District Court of the United States, Southern District of New York

Judgment, Dated July 10, 1947, Appealed From

The above named defendants having moved for an order granting judgment on the pleadings in favor of said defendants, and having also moved for summary judgment and said motions having regularly come on to be heard before this Court on the 27th day of August, 1946, and the Court having rendered its decision on April 30, 1947, granting said motions of the defendants and dismissing the complaint herein, and an order having been duly made and entered on the 3rd day of June, 1947, directing that the complaint herein be dismissed without costs,

Now, on motion of the attorneys for the defendants herein, it is

Adjudged that the complaint herein against the defendants be and the same hereby is dismissed without costs.

William V. Connell, Clerk.

July 10, 1947.

[fol. 109] In District Court of the United States

Notice of Appeal

Sirs:

Please Take Notice that plaintiff, Acme Fast Freight, Inc., hereby appeals to the Circuit Court of Appeals of the Second Circuit from the final judgment entered herein July 10, 1947, and from the order of Hon. John Bright, dated June 3, 1947, herein, denying plaintiff's motions for summary judgment.

Dated, July 11, 1947.

Clark, Carr & Ellis, Plaintiff's Attorneys, 120 Broadway, New York City.

To Rowland L. Davis, Jr., Esq., Attorney for Defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants, Pennsylvania Railroad Company and Loftin and Martin, as Trustees, 120 Broadway, New York City.

Thomas L. Ennis, Esq., Attorney for Defendant, Delaware & Hudson Railroad Co., 230 Park Avenue, New York City.

Pierce & Greer, Esqs., Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City.

[fol. 110] In District Court of the United States

Designation by Plaintiff-Appellant

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Amended complaint.

2. Amended answer of Defendant, Delaware, Lackawanna & Western Railroad Company, as typical of all answers.

3. Plaintiff's motion for summary judgment and supporting affidavit.

4. Plaintiff's motion to strike defenses.

5. Answering affidavit of B. H. Wettlaufer.

6. Answering affidavit of H. W. Kerns, with printed matter annexed thereto omitted, but to be submitted in printed form to the Court on argument.

7. Answering affidavit of William C. Morrow, with printed matter incorporated therein omitted, but to be submitted in printed form to the Court on argument.

8. Opinion of Judge Bright.

9. Order dated June 3, 1947, denying plaintiff's motion and granting defendants' motion.

10. Judgment.

11. Notice of appeal.

[fol. 111] 12. Statement of points on which appellant intends to rely.

13. This designation.

Clark, Carr & Ellis, Plaintiff's Attorneys.

To Rowland L. Davis, Jr., Esq., Attorney for Defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants, Pennsylvania Railroad Company and Loftin and Martin, as Trustees, 120 Broadway, New York City.

Thomas L. Ennis, Esq., Attorney for Defendant, Delaware & Hudson Railroad Co., 230 Park Avenue, New York City.

Pierce & Greer, Esqs., Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City.

[fol. 112] IN DISTRICT COURT OF THE UNITED STATES

STATEMENTS OF POINTS ON APPEAL

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in holding that plaintiff was not entitled to summary judgment.

2. The court erred in holding that the first and second affirmative defenses of the defendants presented sufficient defenses.

3. The court erred in holding the complaint insufficient.

4. The court erred in granting summary judgment for the defendants.

Clark, Carr & Ellis, Plaintiff's Attorneys, 120 Broadway, New York City.

[fol. 113] To Rowland L. Davis, Jr., Esq., Attorney for Defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants, Pennsylvania Railroad Company and Loftin and Martin, as Trustees, 120 Broadway, New York City.

Thomas L. Ennis, Esq., Attorney for Defendant, Delaware & Hudson Railroad Co., 230 Park Avenue, New York City.

Pierce & Greer, Esqs., Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City.

[fol. 114] IN DISTRICT COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE BY DEFENDANTS-APPELLEES

The defendants-appellees, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Delaware & Hudson Railroad Corporation; The Delaware, Lackawanna and Western Railroad Company; Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, Pennsylvania Railroad Company and Wabash Railroad Company, hereby designate, pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the following additional portions of the record, proceedings and evidence to be contained in the record on appeal in the action herein:

1. Stipulation dated September 6, 1946 and order amending plaintiff's amended complaint.

2. Stipulation dated August 26, 1946 amending plaintiff's motion for summary judgment and plaintiff's motion to strike out the first and second affirmative defenses, contained in the answers of certain defendants, to include the Wabash Railroad Company.

3. Answer of the defendant Pennsylvania Railroad Company as typical of the answers of the Delaware & Hudson Railroad Corporation and Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railroad Company.

4. Motion of the defendants, The Delaware, Lackawanna and Western Railroad Company and Chicago, Milwaukee, [fol. 115] St. Paul & Pacific Railroad Company, dated August 20, 1946, for judgment on the pleadings.

5. Plaintiff's interrogatories dated August 16, 1946, to defendants Wabash Railroad Company, The Delaware, Lackawanna and Western Railroad Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

6. Answer of defendant Wabash Railroad Company dated August 22, 1946 to plaintiff's interrogatories, as typical of the answers of the defendants, The Delaware, Lackawanna and Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

7. Stipulation dated May 19, 1947 and order amending *nunc pro tunc* the motion of the defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and The Delaware, Lackawanna and Western Railroad Company, dated August 20, 1946, for judgment on the pleadings, to include as moving parties therein all other defendants herein; further amending the said notice of motion *nunc pro tunc* so as to include therein a motion for summary judgment on behalf of all of the defendants herein; further stipulating that the decision of the Court herein is to be considered as the decision on the motion for judgment on the pleadings by the defendant, as so amended, *nunc pro tunc*, and as a de-
[fol. 116] cision on a joint motion of the defendants for summary judgment herein.

Dated: July 21, 1947.

Rowland L. Davis, Jr., Attorney for Defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and The Delaware, Lackawanna and Western Railroad Company, 140 Cedar Street, New York 6, N. Y.; Bleakley, Platt, Gilchrist & Walker, by Roswell P. C. May, a Member of the Firm, Attorneys for Defendants, Pennsylvania Railroad Company and Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, 120 Broadway, New York 5, N. Y.; Thomas L. Ennis, Attorney for Defendant, Delaware & Hudson Railroad Corporation, 230 Park Avenue, New York, N. Y.; Pierce & Greer, by H. Brua Campbell, a Member of the Firm, Attorneys for Defendant, Wabash Railroad Company, 44 Wall Street, New York, N. Y.

To: Clark, Carr & Ellis, Esqs., Attorneys for Plaintiff, 120 Broadway, New York, N. Y.

[fol. 117] In United States District Court

Stipulation as to Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, September 17, 1947.

Clark, Carr & Ellis, Attorneys for Plaintiff-Appellant; Rowland L. Davis, Jr., Attorney for Defendants-Appellees Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company; Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants-Appellees, Pennsylvania Railroad Company and Loftin and Martin as Trustees; Thomas L. Ennis, Attorney for Defendant-Appellee, Delaware & Hudson Railroad Co.; Pierce & Greer, Attorneys for Defendant-Appellee Wabash Railroad Company.

[fol. 118] Clerk's Certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81—October Term, 1947.

(Argued January 6, 1948 Decided March 1, 1948.)

Docket No. 20756

ACME FAST FREIGHT, INC.,

Plaintiff-Appellant,

—v.—

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Defendants-Appellees.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment in favor of defendants denying plaintiff's motions for summary judgment and to strike affirmative defenses as insufficient, and granting defendant's cross-motions for judgment on the pleadings and summary judgment.

CLARK, CARR & ELLIS (Paul A. Crouch of counsel) *for plaintiff*;

BLEAKLEY, PLATT, GILCHRIST & WALKER (Joseph Walker, Roswell P. C. May and Dennis P. Donovan, of counsel) for Pennsylvania Railroad Company and Loftin and Martin;

THOMAS L. ENNIS for Delaware & Hudson Railroad Company;

ROWLAND L. DAVIS, JR., for Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company;

PIERCE & GREER (H. Brua Campbell, of counsel) for Wabash Railroad Company.

This is an action for a declaratory judgment brought by a freight-forwarder against six railroads. The plaintiff-appellant, who is subject to the provisions of Part IV of the Interstate Commerce Act (49 U. S. C. A. §§ 1001 *et seq.*), claims to have subrogation rights against these railroads under § 1013 of that Act for payments it has made to shippers for shipments lost or damaged on appellees' lines. The appellees have defended the claims on the ground that they did not receive written notice of loss within nine months, as provided in the uniform bill of lading, although timely written notice was given by the shippers to the appellant. The appellant, on the other hand, has maintained that notice to it by the shipper satisfies the requirement of notice and establishes it rights of subrogation. The District Court dismissed appellant's motion for summary judgment, and granted appellees' cross-motions for judgment on the

pleadings and summary judgment, and appellant brought this appeal.

The business of appellant as a freight forwarder [1] is to assemble numerous less-than-carload shipments of individual shippers, to consolidate them into carload quantities, and to ship them as carload shipments by rail or other carrier to distribution destinations, where each carload shipment is broken up and delivered to the individual consignees. The freight forwarder does not ordinarily transport the goods itself, and owns no trucks or means of transportation. It relies for its profit on the spread between the shipping-rates applicable to carload shipments and those applicable to less-than-carload shipments. It issues to the individual shipper a bill of lading, which is the same in fact as the uniform railroad bill of lading, the shipper being the consignor and the person to whom the shipment is ultimately destined being the consignee. The railroad to whom the forwarder delivers the carload lots for shipment, however, issues a second bill of lading to the forwarder, naming it as both consignor and consignee, and has no knowledge of the individual shippers or destinations.

FRANK, *Circuit Judge:*

1. This decision must turn on whether or not freight forwarders are to be considered receiving carriers under the conditions in this case for the purposes of Section 1013 [2] and the Carmack Amendment (49 U. S. C. A. Section

1. The operations of the plaintiff are described at length in the opinion below [not reported] ( ) and in *Acme Fast Freight, Inc.* v. *United States*, 50 F. Supp. 968 (S. D. N. Y.) affirmed 309 U. S. 638.

2. Section 1013 reads: "Section 1013. Bills of lading and delivery of Property. The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title, including penalties, as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service

20(11)[3] and 20(12).[4] Prior to the enactment in 1942 of Part IV of the Interstate Commerce Act regulating freight forwarders, they were for most purposes considered shippers,

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subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12). When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and receipted for on the delivery receipt, of the freight forwarder."

3 So far as here pertinent, Section 20(11) provides: "Section 20, par. (11) Liability of initial carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation [in interstate commerce] * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, * * * and any such common carrier railroad or transportation company so receiving property for transportation, * * * shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not * * * Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law * * *"

4 Section 20(12) provides: "§20, par. (12) Recover by initial carrier from connection carrier. The common carrier, railroad or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damages, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

not carriers," although their liability to their customers was the same as that of a carrier.[6] We agree with appellees that the general effect of that legislation was not to make carriers of such forwarders. The Act defines a freight forwarder as one who "holds itself out to the general public to transport or provide transportation of property," and "utilizes, for the whole or part of the transportation of such shipments, the services of a carrier or carriers."[7] Forwarders are nowhere referred to in the Act as carriers. The purpose of the legislation was obviously to subject freight forwarders to regulation, from which they had previously been exempt, particularly with regard to their rates, in order to prevent their discrimination among individual shippers and among railroads, and to establish more reasonable competition as between railroads, forwarders, motor-carriers and other transportation agencies.[8] To subject forwarders to the control of the Interstate Commerce Commission it was not necessary to make them into carriers, and indeed, in view of their operations, it would have been a strange linguistic feat for Congress to have done so.

Nevertheless, we think that when Congress said in Section 1013 that, for the purposes of Section 20(11), and (12),

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5. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry.* v. *O'Connor*, 232 U. S. 509; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444.

6. See *Kettenhoffen* v. *Globe Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902; *Slutzkin* v. *Gerhard & Hey, Inc.*, 199 A. D. 5, 14 (N. Y.); *Highway Freight Forwarding Co.* v. *Public Service Commission*, 108 Pa. Sup. Ct. 178, 164 Atl. 835; *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968, 9 (S. D. N. Y.) aff'd. 309 U. S. 638.

7. 49 U. S. C. A. §1002(5).

8. The need for such regulation became imperative when the courts sustained the Interstate Commerce Commission in holding that forwarders were not subject to the Motor Carrier Act of 1935 (49 U. S. C. A. §§301 *et seq.*) or as express companies to Part I of the Interstate Commerce Act (49 U. S. C. A. §§1 *et seq.*) and that their joint rates with motor carriers were unlawful. *Acme Fast Freight, Inc.* v. *United States, supra.*

a "freight forwarder shall be deemed both the receiving and delivering transportation company," it meant that for the limited purposes of that section a forwarder is to be treated as a carrier. From the language of the Act, such construction strikes us as both obvious and reasonable. While it would not square with reality to consider a freight forwarder a carrier for all purposes, neither would it be reasonable, in an Act which itself distinguishes forwarders from individual shippers, to treat a forwarder in all respects like any other shipper. Moreover, as forwarders already had a common-law liability similar to the common-law liability of a carrier, it would appear reasonable for Congress, to treat them as carriers for the purposes of statutory subrogation provisions which modify that carrier liability.

2. Appellees argue that, even if appellant has the status of a carrier under Section 1013, they are not "connecting carriers" liable to the forwarders as initial carriers under section 20(12), because appellees are not carrying the same property as that on which the initial carrier issued its bill of lading, and because transportation to come under that section must be on a through bill of lading. The factual basis of their argument is that the forwarder issues one bill of lading to the shipper, while the railroad issues a second bill of lading to the forwarder, and that, in the two bills of lading, the named shipments, rates, routes, origins, destinations, consignors and consignees are different.

Carriers at common law were liable for all loss or injury not due to the act of God or public enemy, the inherent nature of the goods, or the act or fault of the shipper.[9]

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9 *New Jersey Steam Nav. Co.* v. *Merchant's Bank*, 6 How. 343, 381; *Inland Waterways Corp.* v. *Hallet & Carey Co.*, 52 F. (2d) 13 (C. C. A. 8); H Kent, *Commentaries* 597 (14th Ed.); Holmes, *The Common Law*, 180-205; 13 C. J. S. Carriers, §71.

Their strict liability, as insurer, rather than resting on any special contract,[10] grew out of the liability of bailees generally, and is imposed "by operation of law" because of a public policy to protect shippers. This liability could validly be limited by contract or bill of lading, where there was consideration for the limitation, as by a stipulation of value for lower rates.[11] But such contracts, even when supported by consideration, were void and ineffective to relieve a carrier of liability when they were against public policy, as when they attempted to relieve a carrier from the consequences of its own negligence.[12] In most American jurisdictions, however, a carrier was liable only for a loss occurring upon his own lines, and, absent a special contract or statute, a shipper by connecting carriers could recover at common law only from that one on whose lines the loss occurred (although a carrier could contract for through carriage and thus extend its liability over the entire route).[13] In order to correct the burdensome situation of the shipping public in recovering for losses in interstate shipments over connecting carriers,[14] Congress passed the

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10 *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 205; Holmes, loc. cit., *supra*.

11 *Union Pac. R.* v. *Burke*, 255 U. S. 317, 321; *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U. S. 28; *Hart* v. *Penn. R. Co.*, 112 U. S. 331, 341.

12 *San Giorgio I.* v. *Rheinstrom Co.*, 294 U. S. 494, 499; see *Michigan Millers Ins. Co.* v. *Canadian N. R. Co.*, 152 F. (2d) 292, 294 (C. C. A. 8); *McNicholas Transfer Co.* v. *Penn. R. Co.*, 154 F. (2d) 265 (C. C. A. 6).

13 *Oregon-W. Ry. & Nav. Co.* v. *McGinn*, 258 U. S. 409, 413; *Inland Waterways Corp.* v. *Standard Comm. Tobacco Co.*, 65 F. (2d) 715 (C. C. A. 5); *Vital* v. *Kerr*, 297 Fed. 959, 964 (C. C. A. 2) cert. den. *sub nom. Bigio* v. *Kerr*, 265 U. S. 592; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 197.

14 *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 200; *Missouri, K. & T. R.* v. *Ward*, 244 U. S. 383, 387; *Georgia, F. & A. R.* v. *Blish*, 241 U. S. 190, 196; 1 Roberts, *Federal Liability of Carriers* (2d ed.) 685, 686.

Carmack Amendment (49 U. S. C. A. §20(11) and (12)). The Act required a common carrier engaged in interstate commerce to issue a receipt or bill of lading for property received, and made the initial carrier liable to the lawful holder of a bill of lading for any loss, damage or injury to the property caused either by it or by any connecting carrier over whose lines such property might be carried. But the Amendment was not intended to saddle upon the initial carrier the responsibility for any loss which might occur. Therefore it also reserved to the initial carrier the right to recover from the defaulting connecting carrier any sum which it might be required to pay the shipper.

The effect of the Amendment was therefore not to change the liability of carriers, but to provide a new remedy for shippers. It denied the initial carrier the right to limit its own liability to carriage over its own lines, and it made connecting carriers the agents of the initial carrier.[15] But, as between initial and connecting carriers, it expressly left the loss to fall on the carrier primarily responsible, by subrogating the initial carrier, forced to pay a shipper's claim, to whatever right that shipper had against the defaulting carrier at common law, and by leaving untouched the shipper's common-law rights against the defaulting carrier.[16]

If it is borne in mind that the purpose of the Carmack Amendment was to protect shippers, and that for the purposes of Section 1013 which extended its provisions to freight forwarders, the latter are to be considered initial carriers and not shippers, we think the appellees' objection

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15 *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 196, 201; *Northern Pac. R. Co.* v. *Wall*, 241 U. S. 87; *Texas & P. R. Co.* v. *Leatherwood*, 250 U. S. 478, 480.

16 *Georgia, F. & A. R. Co.* v. *Blish Co.*, 241 U. S. 190; *Chicago & Northwestern R. Co.* v. *Whitnack Produce Co.*, 258 U. S. 369, 374; *Penn. R. Co.* v. *Musante Phillips, Inc.*, 42 F. Supp. 340 (D. C. Cal.).

that they are not connecting carriers cannot be sustained. It seems apparent that nothing in the legislative history of either Act was intended to deprive the individual shippers of their common-law right of recovery against railroads as intermediate carriers.[17] Before the enactment of section 1013, where goods were shipped through a forwarder, the courts allowed the shippers to recover directly from the carrier.[18] It is true that the courts based recovery on the undisclosed principal theory of agency, and that when a forwarder is considered an initial carrier under section 1013, the agency relationship of shipper and forwarder no longer

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17 With respect to section 1013, the House Committee Report, H. R. 1172, 77th Cong., 1st Sess., stated: "This section makes the provisions of section 20(11) and (12) of the Interstate Commerce Act applicable with respect to freight forwarders. The effect of this bill will be to require freight forwarders to give their customers a bill of lading covering the service performed by the freight forwarder, under which the freight forwarder will assume liability for the movement of property from point of origin to point of destination * * * but in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight forwarder utilizes, the freight forwarder will have the right to subrogation against the carrier under section 20(12)."

Against this appellees cite a statement made subsequent to the Report of the Committee by Rep. Wolverton on the floor of the House while explaining the bill, 87 Cong. Rec. Pt. 8, p. 8220: "If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right to subrogation under section 20(12), since its own shipper never had any right of action against such carrier." We think that Rep. Wolverton's premise, *i.e.*, that the shipper would have no cause of action against the carrier, was in error, and therefore his conclusion was unsound. We do not think, therefore, that an interpretation of the Act can be based upon it, especially as he was not Chairman of the Committee.

18 See *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 509, where the shipper through a forwarder brought action directly against the railroad and was permitted to recover, though bound by a stipulation of value made by the forwarder as her agent. See also *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 343, 379-381, where a bank shipped through a person who performed the functions of what today is a forwarder, and was permitted to recover directly from the carrier under the doctrine of the theory of undisclosed principal.

exists. Nevertheless, we do not think that section was designed to abrogate that right. Since the right did exist for the individual shipper, we think the effect of the Carmack Amendment was to subrogate the freight forwarder, as for this purpose the initial carrier, to that right.

The fact that the shipments given to the forwarder are consolidated by it and sent on by a railroad under another bill of lading would not be sufficient, we believe, to relieve the carrier of liability to the shipper. For the shipper, the goods are the same, whether transported under the same bill or another.

If the shipper by freight forwarder lost his rights against the actual carrier, and the forwarder were thus deprived of his rights of subrogation, it would put the forwarder in a position of an insurer for the entire transportation of the goods. We would require a clearer showing to hold that, because of the circumstance of the use of two bills of lading by freight forwarders, Congress intended, by incorporating the Carmack Amendment into the legislation regulating freight forwarders, to impose an absolute liability on them for through carriage, when no such liability was imposed on other initial carriers by the original amendment. We think the purpose of Section 1013, viewed in the light of the history of the Carmack Amendment itself, was simply to protect shippers through forwarders by giving them the same remedy against the person to whom they delivered their goods that they would have had if they had originally delivered to a railroad. We think that Section 1013 was not intended to change the other policy of the Carmack Amendment, *i.e.*, that the loss, as between carriers, should fall on the one responsible. We think that, despite the issuance of a new bill of lading, appellant was subrogated to a right which the original shipper had against the railroads.

3. Appellees argue that, even if appellant is an initial carrier with subrogation rights under section 1013, that right has been limited, with respect to the time within which claims must be filed, by contract under Section 2(b) of the bill of lading issued by them to the forwarder.[19] We think that argument ignores the terms of the bill of lading on which it rests. Assuming, without deciding the point, that the railroad's bill of lading could control the right to which appellant has been subrogated, we observe that the indicated section provides merely that claims "must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss * * * occurred * * * " This bill of lading is to be construed as consistent with section 1013, under which the case arises. For the purposes of that section we have already held that the forwarder is the initial carrier, which is the same as the receiving carrier. Notice to it by the shipper, will, then, satisfy section 2(b) of the bill of lading of the railroad, as it satisfies the purpose of that section, namely, that of avoiding undue delay in filing claims.

Reversed and remanded.

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19 Section 2(b) of the Uniform Bill of Lading reads: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after the delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed, and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of March one thousand nine hundred and forty-eight.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

ACME FAST FREIGHT, INC., Plaintiff-Appellant,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Acme East Freight, Inc. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., et al. 81. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 1, 1948. Alexander M. Bell, Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

(6713)

[fol. 133] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 53,062. U. S. Circuit Court of Appeals, Second Circuit. Term No. 65. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Delaware & Hudson Railroad Corporation, et al., Petitioners, vs. Acme Fast Freight, Inc. Petition for writ of certiorari and exhibit thereto. Filed May 29, 1948. Term No. 65 O. T. 1948.

Office - Supreme Court, U. S.
MAY 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 832 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

vs.

ACME FAST FREIGHT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
Petition	1
A. Summary Statement of the Matter Involved	1
B. Specification of Errors	6
C. Reasons Relied on for the Allowance of the Writ	7
Brief	10
I. Opinions Below	10
II. Jurisdiction	10
III. Statement of the Case	11
IV. Specification of Errors	14
V. Summary of the Argument	15
POINT I—The Forwarder Act (Interstate Commerce Act, Part IV) has never been passed upon or interpreted by this court, and the questions presented are of first impression	15
POINT II—Prior to the enactment of the Forwarder Act, respondent, as to the railroads whose services it utilized, was a shipper. It was not the intent of Congress that the Act should change such status and the legislation did not in fact effect such a result	16
POINT III—The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable	30
POINT IV—Even if respondent be deemed "initial carrier" as to a railroad and to have a right-over under Section 20(12), such right-over is regulated, modified and limited by agreement, i. e. Section 2(b) of the bill of lading issued to respondent	33
POINT V—The writ of certiorari sought in the annexed petition should be granted	36

CASES CITED

PAGE

Acme Fast Freight, Inc. v. U. S., 30 Fed. Supp. 968, aff'd 309 U. S. 638 ..... 17, 23

American Railway Express v. Levee, 263 U. S. 21 27

Atlantic Coast Line v. Riverside Mills, 219 U. S. 186.. 32

Beckhusen & Gibes v. Hamblet, 2 Q. B. D. 18 (1900) ... 26

Freight Forwarder Investigation, 229 I. C. C. 201, 297 ..... 16, 17, 31

General Carloading Co., Inc. Freight Forwarder Application, 260 I. C. C. 345 19

Georgia, Florida and Alabama Railroad v. Blish Milling Co., 241 U. S. 190, 197 27

Great Northern Ry. Co. v. O'Connor, 232 U. S. 508 ..... 17, 27, 28

Highway Freight Forwarding Co. v. Public Service Com., 108 Pa. Sup. Ct. 178, 164 Atl. 835 31

H. Midwood's Sons v. Alaska Portland Packers Ass'n, 28 R. I. 303; 67 Atl. 61 26

I. C. C. v. D. L. & W. R. R. Co., 220 U. S. 235 17

J. R. Kelly Freight Forwarder Application, 260 I. C. C. 315, 321 24

Kettenhoffen v. Globe Transfer & Storage Co., 70 Wash. 645; 127 Pac. 295; 42 L. R. A. 31

L. V. R. R. Co. v. U. S., 243 U. S. 444 17

M. K. & T. Ry. Co. v. Ward, 244 U. S. 383 .. 7, 12, 15, 30, 31

New Jersey Steam Navigation Co. v. The Merchants Bank, 6 How. 343, 379-381 27

Roosevelt v. Doherty, 129 Mass. 301 26

Slutzkin v. Gerhard & Hey, Inc., 199 A. D. 5, 14 31

U. S. v. Amer. Trucking Ass'ns, 310 U. S. 534 29

Ward, M. K. & T. Co. v. (244 U. S. 383) 7, 12, 15, 30, 31

Statute Cited

PAGE

Interstate Commerce Act:

Sections 1 et seq. 3
Sections 2 and 3, Part I 4
Section 20(11) 2, 13, 19, 20, 21, 25, 33, 34
Section 20(12) 2, 13, 15, 19, 20, 21, 25, 33, 34, 35
Sections 401 et seq. 23
Sections 1001 to 1022, Part IV 2, 3, 16, 18
Section 1002(5) 21, 23, 32
Section 1004(c) 4, 18, 23
Section 1004(d) 19
Section 1009 22
Section 1013, Part IV 2, 3, 5, 7, 15, 18, 20, 21, 24, 25, 27, 28, 29, 35

U. S. Code, Title 28, Sec. 347 (a) 10

Miscellaneous

Cong. Rec. Vol. 87, Part VIII, p. 8220 ..... 20, 26
Cong. Rec. Vol. 87, Part VIII, p. 8223 24
Cong. Rec. Vol. 88, Part III, p. 4065 24
Cong. Rec. Vol. 87, p. 8216 25
Cong. Rec. Vol. 87, p. 8227 26
87 Cong. Rec., Part VIII, pp. 8218-19 22
House Report No. 1516; H. R. 2764; 79th Con., Second Session 22
14 Harvard Law Review, 146 26
2 Meechem on Agency, 2nd Edition, § 2060 26
Restatement of the Law of Agency, Vol. 1, § 187 and Vol. 2, § 305 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. _____

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

vs.

ACME FAST FREIGHT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the other petitioners herein respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This action was originally brought by the respondent, Acme Fast Freight, Inc., in the United States District Court for the Southern District of New York, for a declara-

tory judgment with respect to Section 1013 of Part IV of the Interstate Commerce Act; enacted May 16, 1942 (56 Stat. 295; Title 49, U. S. C. A., Section 1013).

Part IV of the Interstate Commerce Act (49 U. S. C. A. Sections 1001 to 1022) regulates freight forwarders. Basically, the controversy herein is whether, on forwarder traffic transported in part by rail carriers, that portion of the movement effected by rail carriers is governed by the bill of lading issued by the initial rail carrier to the forwarder or by a bill of lading previously issued by the forwarder to its shipper. By a declaratory judgment respondent seeks to avoid the application to it, as shipper, of the claim provision of the rail carriers' bill of lading.

In its action respondent, a forwarder, asks that Section 1013 (set forth in full at p. 17 *infra*) be construed by the Court as declaring that on shipments which it originates (and on which respondent issues its own bills of lading to its own customers) it is the "receiving" (initial) carrier within the intendment of Section 20 (11) and 20 (12) of Part I of the Interstate Commerce Act (Carmack Amendment, set forth at R. 122, 49 U. S. C. A. Sec. 20(11) and 20(12)); that it is also "receiving carrier" within the meaning of the uniform bill of lading which it issues to its customers for each individual package shipment received by it, which individual package shipments it subsequently consolidates and delivers to petitioning rail carriers and for which it receives a second bill of lading issued to it by such rail carriers. Under the Carmack Amendment and under the terms of the uniform bill of lading which it issues as aforesaid, respondent alleges that the filing of claims for loss or damage with it by its shippers is a compliance with the claim clause in its bill of lading so as to enable it, upon payment of such claims, to recover over against the rail carrier on whose line the loss or damage occurred without compliance by it with the claim clause in the subsequent bill of lading issued to it by the first rail carrier receiving the consolidated carload shipment (R. 7).

Respondent's claim of alleged right of recovery over against the rail carriers is based on the claim that it is subrogated to the rights of its shippers against the rail carriers by virtue of the alleged incorporation of the provisions of the Carmack Amendment into the Forwarder Act by the provisions of Section 1013 of that Act (R. 7).

Although the claim clauses in the bill of lading which respondent issues and in the bill of lading subsequently issued to respondent by the first rail carrier are identical (clause set forth at R. 129), instances have occurred where respondent's shipper has filed claim with it within the nine months' period provided for in respondent's bill of lading but in which respondent has failed to file claims against the rail carriers within the nine months' period provided for by the rail carriers' bill of lading (R. 6).

Respondent further sought a declaration that it is not required to file claim with the railroad carriers within the period provided by the railroad uniform bill of lading in such circumstances, but is subrogated to the claims of its shippers as filed with it so that it may recover from the railroads for any claim paid by it to a shipper for loss or damage occurring during rail transportation (R. 7).

The respondent is a freight forwarder subject to Part IV of the Interstate Commerce Act, commonly known as the Freight Forwarder Act (49 U. S. C. A., Secs. 1001 to 1022). The petitioners are rail carriers subject to Part I of the Interstate Commerce Act. (49 U. S. C. A., Secs. 1 et seq.)

The respondent as freight forwarder assembles and consolidates package shipments—known as "less than carload" shipments—into carload shipments, which consolidated carloads are shipped by the respondent as shipper consigned to itself as consignee, at some central or other distribution point selected by the respondent (R. 31). The shipments which respondent assembles are those of numerous shippers consigned to various consignees at numerous destinations (R. 33, 34). Respondent charges its individ-

ual shippers a rate or charge which is usually less than such shipper would be charged by petitioners if the shipment were delivered to the railroad directly and handled as a less than carload shipment. After consolidation of numerous shipments into carload shipment or shipments, the respondent tenders the consolidated shipments to the petitioners as carload shipments only, to be transported at the rail carriers' carload rate to a designated rail destination (R. 33, 35, 36). The rail destination need not be the actual destination of any of the packages in the carload and if it is not the respondent will arrange for the handling beyond by the same or other forms of transportation (R. 74).

The *raison d'etre* of a forwarder such as the respondent is the profit to be made from the difference between the rate charged to the individual package shippers and the carload rate charged to the forwarder as shipper by the petitioners for the consolidated shipment. Through the loss of identity of the individual package shipments, due to the amalgamation of the shipments, owned by several shippers, into a consolidated carload to be shipped in the name of the forwarder as shipper and consignee, the forwarder is, as to the rail carriers, a shipper, while as to the package owner or shipper it may be a transportation agency.

There is no dispute as to the manner in which the respondent conducts its business as forwarder. It is admitted that the respondent performs no part of the actual transportation. The respondent is not in fact a carrier and Part IV does not designate or characterize the respondent as a carrier. If the respondent is not a carrier, the claim clause of the railroad uniform bill of lading cannot be avoided by it except by preferential or discriminatory treatment prohibited under both Part IV (Sec. 1004 (c)) and Part I (Secs. 2 and 3) of the Act.

The respondent moved for summary judgment against petitioners Wabash Railroad Company, Delaware, Lacka-

wanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company (R. 54); and also moved to strike out the affirmative defenses contained in the answers of all the petitioners (R. 72; R. 78). The petitioners Delaware, Lackwanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company cross-moved for judgment on the pleadings (R. 71). By stipulation the cross motion was amended to include all petitioners herein as moving parties and further amended to include therein a motion for summary judgment on behalf of all the petitioners herein (R. 81, 82).

The District Court denied respondent's motions (R. 107), and directed summary judgment for the petitioners on the ground that the respondent was not a carrier but merely a forwarder; that as forwarder it was subject to Part IV only of the Act; that carriers by rail were subject to Part I only, and not Part IV of the Act; and that as to the rail carriers the respondent was a shipper and therefore required to comply with the claim clause of the rail carriers' bill of lading issued to respondent on its carload shipments (R. 83-102). The Circuit Court of Appeals, Second Circuit, reversed the judgment of the District Court in an opinion in which it held that the respondent was obviously not a carrier, but also held that for the limited purpose of Section 1013 the respondent might be considered a carrier, and that, as such, it was an initial carrier, so that filing of a claim with the respondent by any one of the respondent's shippers would satisfy the claim clause of the respondent's bill of lading, and enable respondent, by subrogation, to recover against the rail carrier at fault without complying with the claim clause in the rail carrier's bill of lading (R. 119-129).

The judgment of the District Court was entered on July 10, 1947, and the opinion of the Circuit Court of Appeals reversing the judgment was handed down on March 1, 1948, and judgment entered on the same date (R. 119, 131).

B.

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred:

1. In reversing the judgment awarded in favor of the petitioners dismissing the complaint on the merits.

2. In failing to affirm the judgment below.

3. In failing to hold that the respondent is bound by the terms of the bill of lading issued to it by the rail carriers for the transportation of the consolidated carload shipment in all respects, including the requirement that claims be filed in the manner and time therein specified.

4. In holding that the respondent never has been and was never intended by Congress to become a carrier, and at the same time holding that the respondent was an initial carrier.

5. In failing to hold that the respondent was not an initial carrier as to the shipments transported by the rail carriers but was a shipper only, as to such shipments, subject to the rail carriers' carload rates and bills of lading.

6. In holding that the petitioners are bound, in the transportation of the carload shipments received from the respondent, by the terms of the bills of lading issued by the respondent to its individual package shippers, on each package shipment subsequently consolidated into such carload shipments.

7. In holding that the doctrine of *M. K. & T. Ry. Co. v. Ward*, 244 U. S. 383, and similar cases is applicable to the factual situation in this case so as to render void the bill of lading issued to respondent forwarder by the rail carriers.

8. In failing to hold that the bills of lading issued by respondent to its customers for the individual package shipments are not through bills of lading and that the petitioners are not parties thereto.

9. In holding that on forwarder traffic, as involved in this case, the rail carriers are connecting carriers only.

10. In failing to hold that the rail bill of lading issued to respondent forwarder has the effect of limiting any right of recourse or of subrogation, if such right is granted to respondent under Section 1013 of the Interstate Commerce Act, so as to obligate respondent to comply with the claim clause in such bill of lading.

C.

Reasons Relied on for the Allowance of the Writ

The questions involved are all Federal questions arising under the Interstate Commerce Act and are questions of law only.

The principal reasons for the allowance of the writ are:

1. The judgment of the Circuit Court of Appeals, if permitted to stand, makes the respondent freight forwarder a carrier so as to avoid the bill of lading issued by the initial rail carrier on respondent's carload rail shipments transported by petitioners and as to which the respondent is and always has been considered the shipper. Such a construction of the effect of Section 1013 of Part IV of the Interstate Commerce Act is a decision construing a federal statute and deciding a federal question of substance not heretofore determined by this Court.

2. The decision of the Circuit Court of Appeals adversely affects every rail carrier in the United States, is

national in scope and is a decision with respect to the Interstate Commerce Act which constitutes a precedent of general application.

3. The decision of the Circuit Court of Appeals flies squarely in the face of what appears to have been the legislative intent of the Congress in the enactment of Part IV of the Interstate Commerce Act.

4. The decision of the Circuit Court of Appeals in effect exempts the respondent from the application of the uniform bill of lading prescribed by the Interstate Commerce Commission for use by rail carriers and is in conflict with the weight of authority of decisions construing and applying the provisions of Part I of the Act which are applicable to the respondent as shipper of rail carload shipments.

5. The effect of the decision of the Circuit Court of Appeals voiding the bill of lading issued to freight forwarders on carload shipments tendered to rail carriers by freight forwarders is to allow to freight forwarders a preference as against ordinary shippers tendering carload shipments to rail carriers under like conditions. Such preferential treatment is contrary to the intent of Congress in enacting the Forwarders Act and inconsistent with other provisions of said Act and of the entire Interstate Commerce Act.

6. The Circuit Court of Appeals has decided an important question of law which has not been, but should be considered by this Court. It has construed the provisions of a Federal statute in such a way as to establish a dangerous, fallacious precedent inimical to the best interests of the nation's transportation system if permitted to stand; and which adversely affects the orderly administration of the transportation system of the country.

7. The Circuit Court of Appeals by its decision in this case decided an important question of general law in a way possibly untenable or in conflict with the weight of authority and more particularly in connection with the distinction between a carrier and a forwarder.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit, that said judgment be reversed and the judgment of the District Court reinstated and the respondent's complaint dismissed, and that your petitioners may have such other and further relief in the premises as may be just and proper.

Dated, New York, N. Y., May 28, 1948.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,
DELAWARE & HUDSON RAILROAD CORPORATION,
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company,
PENNSYLVANIA RAILROAD COMPANY, and
WABASH RAILROAD COMPANY,

Petitioners.

By ROSWELL P. C. MAY,
Counsel for Petitioners,
120 Broadway,
New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

vs.

ACME FAST FREIGHT, INC.,

Respondent.

BRIEF FOR PETITIONERS

I. Opinions Below

The opinion of the United States District Court for the Southern District of New York was rendered on June 3, 1947 (R. 83-107) and is not reported.

The opinion of the United States Circuit Court of Appeals was rendered on March 1, 1948 (R. 119-129) and is reported in 166 Fed. (2d) 778.

II—Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered March 1, 1948 (R. 131). The jurisdiction of this Court is invoked under U. S. Code, Title 28, Sec. 347(a).

III—Statement of the Case

Respondent is a freight forwarder subject to Part IV of the Interstate Commerce Act (R. 73). As such, it receives from various shippers individual package or less-than-carload or less-than-truckload shipments and issues bills of lading therefor (R. 31, 32). It causes the individual shipments to be trucked to concentration points where it consolidates them into carload lots (R. 32). It then tenders the consolidated carload lots to a rail carrier for transportation by such rail carrier and its connecting rail carriers to a destination on the line of such rail carrier or its connecting rail carriers. The tender is made by respondent *as a shipper* (R. 32, 33). It is described as shipper in the rail bill of lading and also as consignee, and the consolidated shipment is uniformly described in the rail bill of lading as "one carload mixed merchandise" (R. 33). The railroad accepts the shipment for transportation as a carload shipment and issues its bill of lading therefor as such; and charges the carload rate (R. 33, 35).

The rail bill of lading is a different contract from the bill of lading previously issued by the forwarder to its shipper, although the printed terms and conditions may be the same. The bills of lading show different shippers, different consignees, different points of origin, different destinations, different shipments, different rates and different routes (R. 33, 34). At the time of the tender to the rail carrier the individual shipments for each of which a bill of lading has previously been issued by the forwarder have lost their identity by reason of the consolidation hereinabove referred to and have become merged into the single carload shipment tendered to the rail carriers for transportation on a single new bill of lading. At the rail destination the carload shipment is delivered to respondent and receipted for as a single shipment, is then broken up by respondent into its various component parts and such

parts are caused to be transported by respondent by truck and delivered to the consignee named in respondent's bill of lading, or perhaps further transported by rail in a newly assembled carload lot on a new rail bill of lading (R. 35).

Respondent files its tariffs with the Interstate Commerce Commission pursuant to Part IV of the Interstate Commerce Act (R. 32), and the rail carriers file their tariffs with the Commission pursuant to Part I of said Act (R. 36). The rail carriers are not permitted to have joint rates with the forwarders and do not receive from respondent any portion of the freight charges which it charges its shipper. Likewise, the forwarder cannot be a party to the rail carrier's tariff structure and receives no portion of the freight charges collected by the rail carriers (R. 32, 37). Such freight charges are assessed against the forwarder and paid by it for its own account (R. 35, 36). The forwarder's profit comes from the difference between the charges it collects from its shippers on the package shipments and the low carload charges which it pays to the railroads.

The theory of the complaint is that with respect to the individual package shipments upon which it issues bills of lading to its shippers, the forwarder is, by virtue of § 1013 of the Interstate Commerce Act, the initial carrier and the rail carriers simply connecting carriers; that under the doctrine of *M. K. & T. Railroad Company* v. *Ward*, 244 U. S. 383, the bill of lading issued by the forwarder to its shipper for the package shipment received by it governs also the transportation by the rail carriers of the consolidated carload shipment subsequently delivered by the forwarder to the rail carriers; that the bill of lading issued by the initial rail carrier for the consolidated carload shipment is therefore void; that if a loss occurs on the lines of any one of the rail carriers, the forwarder is liable therefor under the Carmack Amend-

ment (Interstate Commerce Act, § 20(11)); that upon payment of such loss the forwarder is, under § 20(12) of the Interstate Commerce Act, subrogated to the rights of its shipper against the rail carrier; that compliance by its shipper with the claim clause in the forwarder's bill of lading enables its shipper to recover against any of the rail carriers upon the theory that the terms and conditions of transportation over the lines of the rail carriers are governed by the terms of the forwarder's bill of lading; and that the forwarder, being thus subrogated, can recover against the rail carriers without compliance with the terms of the rail carrier's bill of lading. This theory was rejected by the District Court but its decision was reversed by the Court below.

Effect of Application of Respondent's Theory. It being an integral part of respondent's theory that the rail bill of lading issued by the initial rail carrier for the carload shipment received by it is void, the effect of the application of this theory is not simply to enable the plaintiff to escape the claim clause in the rail bill of lading. It also has the effect of varying in numerous respects the responsibility of the rail carrier as to carload shipments tendered to it by forwarders from their responsibility as to carload shipments tendered to them by other shippers under identical conditions. Its effect is to impose upon the rail carriers the greater "less-than-carload" liability for shipments received by the railroad from forwarders as carload shipments and moving under carload rates. On the other hand the railroads, with respect to similar shipments made by shippers other than forwarders, are subject to "carload liability." Numerous clauses in the uniform bill of lading applicable to ordinary shippers, such, for example, as the warehouse clause (Ex. A, Sec. 1(b), R. 42) and the stoppage in transit clause (id., Sec. 1(b)) will not be applicable in respect to forwarder shipments whereas, under like conditions, such clauses might operate to

relieve the carriers from responsibility with respect to shipments tendered by shippers other than forwarders. Liability under the act or default of shipper or owner clause (id., Sec. 1(b)) may be varied. This is because the rail carriers under forwarder traffic become, under respondents' theory, intermediate carriers of the individual package shipments. The liability of an intermediate rail carrier may, in varying circumstances, be quite different from that of a receiving or delivering carrier. Demurrage charges assessable by the delivering rail carrier against the consignee at final rail destination may no longer be assessable on forwarder traffic because, under respondent's theory, the delivering rail carrier is simply an intermediate carrier to the forwarder.

As a result of this, railroad claim agents will be called upon to pay claims presented by forwarders on a quite different basis from claims presented by ordinary shippers of carload lots. In both cases the freight rate is the same, but, under respondents' theory, the measure of responsibility differs.

The disposition of hundreds of thousands of existing or future freight claims is affected in the matter. It will not be denied by respondent that this action was brought against a representative group of rail carriers in order to secure an authoritative decision.

These considerations, as well as the arguments advanced, *infra*, are respectfully urged upon this Court as reasons for granting the writ.

IV. Specification of Errors.

A statement of the specification of errors will be found in the petition for writ of certiorari (*supra*).

V. Summary of the Argument.

I. The Forwarder Act (Interstate Commerce Act, Part IV) has never been passed upon or interpreted by this Court, and the questions presented are of first impression.

II. Prior to the enactment of the Forwarder Act, respondent, as to the railroads whose services it utilized, was a shipper. It was not the intent of Congress that the Act should change such status and the legislation did not in fact effect such a result.

III. The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.

IV. Even if respondent be deemed "initial carrier" as to a railroad and to have a right-over under Section 20(12), such right-over is regulated, modified and limited by agreement, *i. e.*, Section 2(b) of the bill of lading issued to respondent.

V. The writ of certiorari sought in the annexed petition should be granted.

POINT I

The Forwarder Act (Interstate Commerce Act, Part IV) has never been passed upon or interpreted by this court, and the questions presented are of first impression.

The court below interpreted § 1013 of Part IV of the Interstate Commerce Act in such a manner as necessarily to bring about the results heretofore mentioned. It is

claimed (Point II, *infra*) that this interpretation produces a result contrary to the intent of Congress as shown by other provisions of the Forwarder Act, with which it is not in harmony; and also a result out of harmony with the fundamental scheme of the entire Interstate Commerce Act. Determination of the question, therefore, involves an examination of all the provisions of the recently enacted Forwarder Act, the legislative history of the Act, the state of the law and the status of forwarders prior to its enactment, and a comparison of certain sections of Part IV with like sections of other parts. As far as research shows, no question involving interpretation of the Forwarder Act has been decided by this Court. It is submitted that in the interest of orderly administration of the entire Act, and the orderly conduct of the country's transportation system a final decision by this Court on these questions is of importance.

POINT II

Prior to the enactment of the Forwarder Act, respondent, as to the railroads whose services it utilized, was a shipper. It was not the intent of Congress that the Act should change such status and the legislation did not in fact effect such a result.

Prior to the enactment of the Forwarder Act (Part IV, Interstate Commerce Act, 49 U. S. C. A. 1001, *et seq.*), the forwarder had the status of a shipper when using railroad common carrier transportation services. As such shipper, it was subject to all the published classifications and tariffs of the railroad, the terms of the railroad bill of lading issued to it, and the railroads were prohibited from giving the forwarder a preference in transportation or discriminating against it.

Freight Forwarder Investigation, 229 I. C. C. 201, 297;

I. C. C. v. *D. L. & W. R. R. Co.*, 220 U. S. 235;
L. V. R. R. Co. v. *U. S.*, 243 U. S. 444;
Cf, as to forwarder and motor carrier, *Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Supp. 968, aff'd 309 U. S. 638.

In instances where the forwarder's shipper sued the underlying rail carrier, such shipper was held to be bound by the bill of lading issued by the rail carrier to the forwarder, its agent.

Great Northern Ry. Co. v. *O'Connor*, 232 U. S. 508.

A modern forwarder secures traffic from many points not reached by the rail carrier, and when it assembles and consolidates such shipments for transportation as rail carrier shipments, it frequently has control of traffic which competing rail carriers and also long-haul motor carriers are anxious to secure. A Commission investigation brought to light various instances in which forwarders were taking advantage of their control of traffic to secure preferential treatment from regulated rail and motor carriers (*Freight Forwarder Investigation*, 229 I. C. C. 201, 304). This very respondent had even gone so far as to establish joint rates with motor carriers, which the Commission had held to have been filed in violation of the Act. The Commission's cancellation of these rates was sustained by this Court in *Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Supp. 968, aff'd 309 U. S. 638, upon the authority of *Lehigh Valley R. Co.* v. *U. S. Interstate Commerce Commission* v. *D. L. & W. R. R. Co.*, and *Great Northern Railway Co.* v. *O'Connor, supra.* The lower court in that case rejected the contention that as to actual carriage of goods the forwarder was anything more than a shipper.

The Commission's investigation of forwarders revealed the necessity of legislation on the subject, and in 1942 there was enacted the Forwarder Act which became Part IV of

the Interstate Commerce Act (49 U. S. C. A. 1001, *et seq.*). A resumé of the provisions is found in the opinion of the District Court herein (R. 94, 95). That Congress had in mind unsound practices of forwarders looking to receive preferential treatment from common carriers and wished to prohibit the same is clear from § 1004 by which it is made unlawful for any carrier subject to Parts I, II and III to make, give or cause any undue or unreasonable advantage to any freight forwarder. In view of the provisions prohibiting discriminations and preferences in the Elkins Act, and similar provisions in Parts II and III, § 1004 may have been unnecessary, so that its insertion emphasizes legislative thought in the matter.

The provision of Part IV relied upon by respondent as giving it the right of subrogation against rail carriers and having the effect of voiding the rail carriers' uniform bill of lading is § 1013, which reads as follows:

> "§ 1013. *Bills of lading and delivery of property.* The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12). When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common

carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill and receipted for on the delivery receipt, of the freight forwarder. Feb. 4, 1887, c. 104, Part IV, § 413, as added May 16, 1942, c. 318, § 1, 56 Stat. 295."

Respondent relies solely on this section, claiming that it incorporates the Carmack Amendment (§ 20 (11) and (12) of Part I) into Part IV so as to change the status of a forwarder from that of a shipper to an initial carrier and so as to make the rail carriers simply connecting carriers, prohibited as such from issuing bills of lading to forwarders on carload shipments of the same character as may be tendered by ordinary shippers, and thus effecting the preferential results referred to *supra*.

That the section does not have such effect appears from its own terms: The provision of Sections 20(11) and (12) of Part I only apply with respect to freight forwarders "in the case of service subject to this chapter." The service subject to Part IV, as an examination of other provisions of the part show, is the service of forwarding. It is *not* the service of carriage by rail, for that is regulated under Part I of the Act.

In other words, the Carmack Amendment was simply made applicable to contractual arrangements between one forwarder and one or more other forwarders. An illustration is that of joint loading arrangements which are permitted among forwarders in the transportation between assembling and distribution points (49 U. S. C. A. 1004(d). Cf. *General Carloading Co., Inc.: Freight Forwarder Application*, 260 I. C. C. 345, illustrating such an

arrangement). On such joint carload the railroad issues only one bill of lading with one of the forwarders described as shipper. In the event of damage to the other forwarder's shipment and payment of claim, such forwarder should have the right-over for recovery against the forwarder to which the bill of lading was issued which alone could maintain an action against the railroad responsible.

That the phrase, "in the case of service subject to this chapter," was intended by Congress to limit the application of §§ 20(11) and (12) is indicated by the remarks of Representative Wolverton, a member of the House Committee and later of the Conference Committee, who delivered on the floor of the House the authoritative exposition of the bill. He said: "The reference to paragraph (12) of § 20 was included in § 413 [now U. S. C. A. § 1013] to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved" (Cong. Rec., Vol. 87, Part VIII, p. 8220). Representative Wolverton also stated that "if damage to a shipment occurs on the line of a common carrier whose services are being utilized by a forwarder, the forwarder has no right to subrogation under § 20(12) * * *" (*id.*).

The District Court was impressed with this compelling argument and held that § 1013 confines the application of § 20(11) and (12) to the "case of service subject to this chapter", and contemplates nothing further (R. p. 96).

The Court below, however, completely ignored the point, one of the principal contentions of the carriers, and held "that when Congress said in § 1013 that, for the purposes of § 20(11) and (12), a 'freight forwarder shall be deemed both the receiving and delivering transporation company', it meant that for the limited purposes of that section a forwarder is to be treated as a carrier" (R. 124).

In this the Court below clearly erred. As a matter of fact, the denomination of a forwarder as a "transportation company" in § 1013, considered in the light of the language of the Carmack Amendment itself, indicates that Congress was taking special care *not* to designate a forwarder as a receiving or delivering "carrier". Both paragraphs (11) and (12) of § 20 of the Interstate Commerce Act (Carmack Amendment) are applicable to any "common carrier, railroad, or transportation company subject to the provisions of this chapter." Consequently, when, in § 1013, Congress confined itself to denominating a forwarder as a "transportation company" with reference to the Carmack Amendment, it obviously intended to exclude the denomination of a forwarder as a "common carrier" or as a "railroad". The court below, therefore, clearly erred, both in ignoring a principal argument of the petitioners and in adopting a construction which, when analyzed, should favor petitioners rather than respondent.

Bearing in mind that the effect of respondent's interpretation of § 1013 is to change the relationship between forwarder and rail carrier from that of shipper and carrier, which existed at the time of the passage of the Act, so as to constitute the forwarder initial carrier and the rail carrier intermediate connecting carriers, it may be noted that such an interpretation is entirely inconsistent with other provisions of the Forwarder Act and contrary to the intent of Congress as shown by the legislative history.

(a) A freight forwarder is defined in Part IV as follows (49 U. S. C. A. 1002 (5)):

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to Chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compen-

sation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

Note that, while the forwarder (A) "assembles", (B) "assumes responsibility" and (C) "*utilizes* * * * the services of a carrier", it does not itself "carry". It is not a "carrier". What it does is, in the language of the section, "otherwise than as a carrier".

(b) By Section 1009 the forwarder was authorized to continue for a time the existing joint rate arrangements with motor carriers subject to Part II of the Interstate Commerce Act pending establishment of assembling and distribution rates.* By amendments this period of time was extended until, by amendment of February 20, 1946, authorization for continuance of the joint rate and division arrangements between forwarder and motor carrier was granted without restriction as to expiration date, subject to the authority of the Commission.**

But nowhere in Part IV (Forwarder Act) or in Part I (Railroads) is authority granted by Congress for the forwarder and a railroad to enter into joint or through rate

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* For explanation of the reason for this provision, see 87 Cong. Rec., Part VIII, pp. 8218-19.

** For explanation of this amendment, see House Report No. 1516; HR 2764; 79th Cong., Second Session.

or through route arrangements. In the absence of such authority, it is prohibited (*Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Sup. 968, at 973; aff. 309 U. S. 638). And the prohibition indicates an intent to preserve the shipper-carrier status.

(c) No authority is found in either Part I or Part IV for a railroad to give undue or unreasonable preference or advantage to a forwarder, either in rates or practices. On the contrary, as previously noted, Section 1004(c) specifically prohibits any such preference or advantage, and in so doing envisages the continuance of the shipper-carrier relationship.

(d) Nowhere in Part IV is a forwarder referred to as a "common carrier" or, even "carrier". As originally enacted, Part IV referred to forwarder as "carrier" in only one place (§ 1017 (b)), and that occurred through an error in drafting. That error was promptly corrected by Congress through an amendment striking the word "carrier" and substituting "freight forwarder". The gist of Senator Reed's explanation of the amendment was that there should be no question but that a forwarder was not to be deemed a common carrier (Cong. Rec., Vol. 88, Part V, p. 6115).

In fact, Congress, in its definition of a forwarder (Sec. 1002(5)) specifically excluded it from the category of a common carrier or carrier:

> "The term 'freight forwarder' means any person which (*otherwise than as a carrier subject to Part I, II or III of this title*) * * *". (Italics supplied.)

Parts I, II and III cover *all common carriers* engaged in interstate commerce (except airplanes which are regulated under a separate Act, 49 U. S. C. A. 401, *et seq.*).

(e) Nowhere in Part IV is there any express word, language or phrase stating that the status of a forwarder as to a railroad whose services it utilizes has been changed from that of shipper. On the contrary the framers of the Forwarder Act had in mind the preservation of the then existing status. (Congressman Youngdahl, on the Forwarder Bill, Oct. 23, 1941—Cong. Rec., Vol. 87, Part 8, p. 8223. Congressman Wolverton in Conference report of May 11, 1942, Cong. Rec., Vol. 88, Part 3, p. 4065.)

Furthermore, Part IV is interpreted by the Interstate Commerce Commission as making no change in the status of a freight forwarder as shipper with respect to the railroads (*J. R. Kelly Freight Forwarder Application*, 260 I. C. C. 315, 321).

(f) The court below erred in its analysis of the legislative history of the Act. In footnote 17 (R. 127) it quotes (with some omission) the report of the House Committee applicable to § 1013 indicating that it was intended to give forwarders a right of subrogation against rail carriers but it fails to give weight to a vitally important correction of the House Committee report made on the floor of Congress by Representative Wolverton in the course of his statement made in the presence of the Chairman and other members of the Committee and with their support, explaining the bill to the House. This was the only detailed explanation of the bill given at any session of Congress.

At the outset of his address, Mr. Wolverton remarked that there were certain inaccuracies in the report which he intended to clarify.* His entire comment on § 1013 (only a

* Mr. Wolverton said: "In some respects the report which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to the members of the committee or subcommittee, and therefore it may not be out of place to include in these remarks some further explanations which may

(*Footnote continued on following page*)

part of which is quoted by the Court below in its footnote 17) is as follows:

> "In its explanation of section 413 [49 U. S. C. A., § 1013] the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person to which such shipper is entitled to look for recovery of damages, and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company.' If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right to subrogation under section 20(12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more for-

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be helpful to the Members in their consideration of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended.

"In addition there has come to the attention of the committee certain criticisms of the bill by some of the trucking interests as to which the members would doubtless be interested in knowing the conclusions of the committee. *For these reasons I shall endeavor to clarify the views of the committee in respect of these several matters.* In order, however, that what is said with respect to individual points shall appear in its proper relation to the subject as a whole, I think it will be of interest to the Members of the House if I first briefly sketch the development of forwarding operations in recent years." (Italics ours.) (Cong. Rec., Vol. 87, p. 8216.)

warders were involved." (Cong. Rec., Vol. 87, Part VIII, p. 8220.)*

The District Court agreed with Mr. Wolvertion (R. 98, 100, 101). The Court below thought his premise *i. e.*, that the shipper would have no cause of action against the carrier was in error and, therefore, that his conclusion was unsound (Footnote 17, R. 127).

In this statement the Court below was in error. The forwarder's shipper cannot sue the rail carrier on the forwarder's contract because the rail carrier is not a party to it. The forwarder's shipper cannot sue the rail carriers on the railroad bill of lading because the forwarder's shipper is not a party to it. He is simply the undisclosed principal of the forwarder, his agent as to a component part of the entire carload shipment. The so-called exception to the rule of privity of contract applicable to an undisclosed principal does not apply where the undisclosed principal is merely one of several interested in a single indivisible contract made by the agent in his own name and his interest is not apportioned. In such case neither the principal nor the third person can sue each other;** but even if it

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* In the court below respondent attempted to avoid the effect of Mr. Wolverton's remarks by intimating that he was simply the ranking minority member. However, following Mr. Wolverton's authoritative explanation of the bill, the Chairman of the Committee expressed no disagreement but remarked, as to Mr. Wolverton, that he "gave unstinted work to these problems and with an ability of which every member of the Committee is well aware. I appreciate his good support of this measure today * * *" (87 Cong. Rec., Part VIII, p. 8227).

** *Roosevelt* v. *Doherty*, 129 Mass. 301;
Beckhusen & Gibes v. *Hamblet*, 2 Q. B. D. 18 (1900);
14 Harvard Law Review, 146 (note commenting on above two cases);
H. Midwood's Sons v. *Alaska Portland Packers Ass'n*, 28 R. I. 303; 67 Atl. 61;
2 Mecham on Agency, 2nd Edition, §2060;

(*Footnote continued on following page*)

should be otherwise and held that the forwarder's shipper has a cause of action against the railroad as undisclosed principal, he is still governed by the terms and conditions of the rail bill of lading (*Gt. Northern Ry.* v. *O'Connor*, 232 U. S. 508).

With respect to the right of the forwarder's shipper to sue the carrier *in tort*, the Court below (R. 127) erred in following *New Jersey Steam Navigation Co.* v. *The Merchants Bank*, 6 How. 343, 379-381, a case decided prior to the enactment of the Interstate Commerce Act, the Carmack Amendment and the Elkins Act, and ignoring such cases as *Georgia, Florida and Alabama Railroad* v. *Blish Milling Co.*, 241 U. S. 190, 197, and *American Railway Express* v. *Levee*, 263 U. S. 21. The latter cases abrogate the common law distinction between *tort* and contract in a loss and damage case brought under the Carmack Amendment and hold that the effect of the provisions of the rail bill of lading cannot be escaped by suing *in tort*.

Restatement of the Law of Agency, Vol. 1, § 187 and Vol. 2, § 305.

The carload shipment made by the forwarder and tendered to the carrier as "carload of mixed merchandise" may consist of several hundred individual packages owned by several hundred people. To permit the carrier to be harassed by several hundred suits brought by several hundred undisclosed principals to a single indivisible contract made with the agent would be intolerable and contrary to the doctrine of the cases cited in this note. There have been instances where a forwarder's shipper has sued a carrier and the point made in this footnote has not been raised but even in such cases the forwarder's shipper, the undisclosed principal, has been held to have been bound by the forwarder's contract with the railroad (*Great Northern Ry.* v. *O'Connor*, 232 U. S. 508). The problem of split claims is one involved in this case which should be passed on by this Court.

The Court below's construction of § 1013 is founded upon inconsistent premises. It holds on the one hand that the forwarder is merely agent of an undisclosed principal, its shipper. On the other hand it gives the forwarder the status of initial carrier with right of subrogation.

Finally, the Court below failed to note that Mr. Wolverton's remarks, above quoted, were concerned with "the intended legal effect" of § 1013. So it is that the authoritative legislative spokesman has recited the "intended legal effect" as being one thing, but that the Court below has held it to have been another.

To summarize: Prior to the passage of the Forwarder Act the relationship between forwarder and railroad was that of shipper and carrier, and the forwarder was bound by the terms of the rail carrier's bill of lading. The foregoing paragraphs indicate (1) that the legislative history shows that it was not the intent of Congress in enacting Part IV to change that situation; (2) that there is no language in the Act expressly effecting a change; (3) that the definition of a forwarder negatives a change; (4) that the prohibition against preference and the absence of authority for joint rates or any common arrangement for rates and routes negatives the implication of a change; (5) that the Interstate Commerce Commission has found no change and (6) that § 1013, upon which plaintiff relies, is limited in its application to "the case of service subject to this Chapter,"—*i. e.*, forwarder service—and so does not effect, and was not intended by Congress to effect, a change. Accordingly, the conclusion is inescapable that, as no change has been effected by the Act, the pre-existing relationship between respondent and the rail carriers still obtains. Respondent is still a shipper and petitioners are still not connecting carriers; respondent is still bound by the terms of the rail bill of lading, including the claim clause. The right of action of respondent, and its shipper, if any, against the railroad is governed by the terms of the rail bill of lading issued by the railroad to respondent (*Great Northern Ry. Co.* v. *O'Connor*, *supra*).

The court below conceded that it was not the intent generally of the Forwarder Act to change the status of for-

warder vis-a-vis rail carrier from that of shipper to initial carrier but claimed that there existed an exception to that intent in § 1013 alone (R. 123). In so doing it ignored the fact that the existence of such an exception would have the legal effect of creating in favor of forwarders the very preferences which it was one of the purposes of the Act to obviate. The holding that the carriers' uniform bill of lading is void as to carload shipments made by forwarders but valid as to carload shipments made by others under like circumstances, with resulting divergent measures of carrier responsibility produces absurd, unreasonable and preferential results.

As stated in *U. S. v. Amer. Trucking Ass'ns.*, 310 U. S. 534, at p. 543:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

It is submitted that the status of a forwarder as shipper as to the railroad long established by the Courts should not be overturned by the Courts and the forwarder declared to be "initial carrier" and "delivering carrier" vis-a-vis the railroad except as a result of legislative enactment definite, clear and explicit in wording, and of an expressed legislative purpose to accomplish such change.

POINT III

The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.

The *Ward* case (244 U. S. 383) presents the classic case of a shipment delivered to a rail carrier by a shipper for transportation to a point on the line of another rail carrier. The second rail carrier, although bound to receive the shipment as a connecting carrier, *at the rate* (244 U. S. 387) and upon the terms named in the original bill of lading, forces the shipper to accept a new and second bill of lading covering the *identical* shipment.

Such is not the way in which forwarders and rail carriers do business with each other. In fact they cannot legally do business that way. The forwarder's tariff, filed pursuant to the provisions of Part IV, provides rates for the transportation of individual packages received by it from the point at which they are received from its shipper, for delivery to that shipper's consignee at final destination. The railroad cannot be a party to this rate, nor is it asked to be. The rail carrier does not force upon the forwarder's shipper a new bill of lading for the transportation of the single package shipment previously delivered to the forwarder. On the contrary, upon request of the forwarder, it issues to the forwarder, *not to the forwarder's shipper*, a bill of lading for an entirely different shipment, a carload shipment, which the forwarder tenders to the railroad as shipper, not as a receiving carrier, in which bill of lading the railroad agrees to transport to a rail destination and there to deliver, not to the consignee named in the forwarder's bill of lading, but to the forwarder itself (R. 32, 33). As a matter of fact the railroads do not

even know who the shippers or consignees of the individual package shipments are, nor do they know the description of the contents thereof (R. 75).

By the terms of the Carmack Amendment, carrier liability is predicated on a shipment moving on a "through" bill of lading. A bill of lading issued by the forwarder is not a through bill of lading. Even if it were, the railroads are not a party to it, do not know of its terms and perform no transportation under or pursuant thereto.

In the face of these undisputed facts respondent asks that the actualities of the situation be disregarded and that the doctrine of the *Ward* case be applied to a situation to which it clearly was not intended to apply.

The District Court rejected this contention and was at pains to point out the inapplicability of the *Ward* case (R. 101, 102).

In reversing the District Court, the Court below seemed to feel that it was necessary that the doctrine of the *Ward* case be applied in order to give the forwarder a right of subrogation against the rail carrier. Otherwise, said the Court, Congress might be held to have imposed an insurer's liability upon the forwarder, without corresponding right of recourse against the rail carrier (R. 128).

In this the Court was in error. Prior to the passage of the Forwarder Act, the forwarder, although held to be a shipper in so far as common carriers were concerned (*supra*, p. 15), had been held, by virtue of the nature of its undertaking, to have a common carrier's responsibility with respect to its customers.*

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* Freight Forwarder Investigation, 229 I. C. C. 201, 304. *Kettenhoffen* v. *Globe Transfer & Storage Co.*, 70 Wash. 645; 127 Pac. 295; 42 L. R. A. (N. S. 902 annot.; *Slutzkin* v. *Gerhard & Hey, Inc.*, 199 A. D. 5, 14; *Highway Freight Forwarding Co.* v. *Public Service Com.*, 108 Pa. Sup. Ct. 178, 164 Atl. 835.

In this state of the law Congress, in the Forwarder's Act, defined a forwarder as one who "assumes responsibility for the transportation of such property from the point of receipt to point of destination" (49 U. S. C. A. 1002(5)). Without such assumption a forwarder cannot secure a certificate of convenience.

But the fact that the forwarder assumes, and by definition must assume, through responsibility as a condition precedent to securing permission to do business, does not by any means indicate that any right of indemnity in favor of the forwarder against the rail carrier was necessary or was intended. The forwarder is also defined as one who "utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1 or 8 or 12 of this Title" (49 U. S. C. A. 1002(5)). Utilizing as it does, the services of common carriers by rail as *shipper*, the forwarder has no need of a statutory right of recourse against the rail carrier because it has the contractual right against it under the bill of lading issued by the rail carrier to it, as such shipper.*

That such was the intent of Congress is indicated by the remarks of Mr. Wolverton, above quoted, when after pointing out that under the Act the forwarder has no right to such subrogation he stated: "The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto."

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* In this respect the situation between forwarder and rail carriers differs from the situation between the initial rail carrier and connecting rail carriers. The rail carrier issues a bill of lading to the forwarder, upon which the latter can sue. Connecting carriers do not issue bills of lading to the initial rail carrier. Shipments move from carrier to carrier on a waybill. Hence, a statutory right of recourse in favor of initial rail carrier against connecting rail carriers was necessary (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186), but a right of recourse in favor of forwarders against rail carriers was not.

Finally, the purpose of the enactment of the Forwarder Act was not, as the Court below seemed to think, to correct any unfavorable condition between the forwarder's shipper and the railroads, for there was no condition needing correction. As has been pointed out the Act was primarily intended to prevent the securing by forwarders of preferential treatment from regulated common carriers, and to regulate the forwarder's charges.

Only by such a construction can Parts I and IV of the Interstate Commerce Act, with their provisions relating to responsibility and liability and their separate rate structures be found to be in harmony.

This view is also in harmony with the limitation in § 1013 of the applicability of §§ 20(11) and (12) "'to the case of service subject to this Part.'" A statutory right of recourse by one forwarder against another was necessary, but the rights of the forwarder-shipper, against the rail carrier under the latter's bill of lading existed at the time of the passage of Part IV and concededly were not affected thereby.

POINT IV

Even if respondent be deemed "initial carrier" as to a railroad and to have a right-over under Section 20(12), such right-over is regulated, modified and limited by agreement, i.e. Section 2(b) of the bill of lading issued to respondent.

An inescapable fact in this case is that respondent, by consolidating numerous small package shipments and shipping them in a carload lot, gets the benefit of the low carload rates provided for in the tariffs of the rail carrier (R. 35, 36). Were each of the individual shipments shipped at the rail carriers less-than-carload rate respondent could not do business at all, much less do business at a profit.

Can it be that respondent can secure, for its own account, the benefit of these low carload freight charges and, at the same time, repudiate the Uniform Rail Bill of Lading contract incorporated in the classification and hitherto held to be an integral part of the rate structure of rail carriers regulated under Part I of the Act?

It is submitted, as a separate and independent argument that, even if the rail bill of lading be held to be void as to the forwarder's shipper, and even if the forwarder be held to be the initial or receiving carrier, nevertheless, the rail bill of lading can still be held valid and binding upon the forwarder as a contract between the forwarder, as initial or receiving carrier (or transportation company) and its "connecting" rail carriers.

As such a contract it can validly operate to regulate, limit or modify any right of subrogation or of recourse found to have been vested in the forwarder under § 1013. In other words, treating the forwarder as a carrier, there is nothing in the statute or common law, to prevent one carrier from making a contract with other carriers regulating and modifying their liability, *inter sese*.

The first part of the Carmack Amendment (Section 20(11)) contains a familiar provision prohibiting the carrier from limiting its liabilty by receipt or bill of lading issued to the shipper. But the second part of that amendment (Section 20(12)), which gives the initial carrier a right of recourse against subsequent carriers, contains no such provision.

Railroad carriers subject to Part I have for many years limited and modified the right-over provided by § 20(12) by promulgating a set of rules for the settlement, prorating and reimbursement for claim payments made by the initial or delivering carrier pursuant to 20(11). These rules are commonly known as Freight Claim Rules. Such rules are essential to make 20(12) workable in practice. Without them there would be chaos in adjustment of freight

claim loss and damage. These Rules in some instances go far beyond the liabilities of railroad carriers *inter sese* under 20(12). For instance, concealed damage and loss, and damage unlocated as to a particular railroad, where there are several participating in a movement, is proratable over all the carriers; but under 20(12) the railroad making the payment could only recover from the railroad responsible, a well-nigh impossible task.

The existence for many years of the Freight Claim Rules is thus evidence that the right-over under (§ 20(12)) can be modified, as between themselves, by the initial and other carriers. This plaintiff is not a party to such rules, but if it has a right-over, a right of subrogation, such right is none the less modified by another contract between plaintiff and the rail carriers. That other contract is the bill of lading issued by the first rail "connecting" carrier to respondent-forwarder, assumed to be the "receiving" carrier. The consideration for the contract is the carload rate which the forwarder pays the rail carrier, and the further consideration of a further reduced rate applicable to shipments subject to the terms of such contract (R. 35).

It is submitted that this bill of lading contract can and should be given effect as a contract between the forwarder as receiving carrier, or receiving transportation company, and the rail "connecting" carriers, and the effect is to regulate and modify the statutory right of recourse or subrogation claimed to be granted the forwarder under § 20(12) as supposedly incorporated into Part IV by § 1013.

That contract contains a claim clause and the forwarder must comply with such clause before it can exercise any rights of recourse or of subrogation against the rail carriers.

The foregoing contention is the subject of a separate and independent defense, by way of confession and avoidance, set up in petitioners' answers (R. 22, 40). The District Court having found in favor of petitioners on the points previously discussed, did not pass on this contention. The Court below, however, in the last paragraph of its opinion (R. 129), rejected it.

It is difficult to comprehend the Court's decision on this point. Petitioners suggest that the Court did not grasp petitioners' position that the rail bill of lading, even if invalid as to the forwarder's shipper, could be treated as a contract between the initial and connecting carriers. Certainly the Court did not appreciate this point when it suggested, in the last sentence of its opinion, that notice by the shipper to the forwarder under the forwarder's bill of lading would be compliance by the forwarder with the requirement of notice contained in a different bill of lading contract between the forwarder and the rail carrier.

It is respectfully submitted that the Court below erred in rejecting this contention.

POINT V

The writ of certiorari sought in the annexed petition should be granted.

Respectfully submitted,

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OCTOBER TERM 1948

No. 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONERS

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INDEX

	PAGE
I. Opinions Below	1
II. Jurisdiction	1
III. Statement of the Case	2
IV. Question Presented	9
V. Specification of Errors	9
Summary of Argument	11
POINT I—Congress in its enactment of Part IV of the Interstate Commerce Act intended that a freight forwarder should retain its dual personality, i. e., (1) that of a transportation company with respect to its package shippers and (2) that of a shipper with respect to the rail carriers whose services it utilizes. Being a shipper of its carload rail shipments, it cannot avoid compliance with the terms and provisions of the uniform railroad bill of lading	12
A. Relationship of forwarder to rail carrier prior to 1942	12
B. Enactment of law regulating forwarders	14
C. Railroad liability under Section 20 (11) of the Interstate Commerce Act	16
D. The Forwarder Act of 1942 did not and was not intended to change the existing status	20
POINT II—The rail transportation of the forwarder's carload of mixed merchandise could not lawfully be effected except under the terms of the uniform railroad bill of lading issued by the initial rail carrier on such carload shipment	39

PAGE

POINT III—The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" of respondent and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable 43

POINT IV—Respondent, a shipper as to the rail carriers, has no right-over against rail carriers under Section 20(11) as incorporated into Section 1043 of Part IV. Were respondent an "initial carrier" as to the railroads, any claimed right-over under Section 20(12) is regulated, modified and limited by agreement *i. e.*, Section 2(b) of the uniform railroad bill of lading issued to respondent 47

CONCLUSION 51

CASES CITED

Acme Fast Freight v. U. S., 30 F. Supp. 968, affirmed 309 U. S. 638 ..... 8, 24, 25, 26, 42

Atlantic Coast Line v. Riverside Mills, 219 U. S. 186 ..... 18, 19, 22

Chesapeake & Ohio Ry. Co. v. U. S., 11 Fed. Supp. 589, affd. 296 U. S. 187 38

Freight Forwarder Investigation, 229 I. C. C. 201, 304 (1938) 13, 24

General Carloading Co., Inc.; Freight Forwarder Application, 260 I. C. C. 345 31

PAGE

Georgia, Fla. & Ala. Ry. v. Blish Co., 241 U. S. 190 22

Great Northern Ry. Co. v. O'Connor, 232 U. S. 508...19, 35

Highway Freight Forwarding Co. v. Public Service Com., 108 Pa. Sup. Ct. 178, 164 Atl. 835 12

I. C. C. v. Chicago Great Western Rwy. Co., 141 Fed. 1003; affd. 209 U. S. 108 38

I. C. C. v. D. L. & W. R. R. Co., 220 U. S 235 13

Interstate Commerce Commission v. Balt. & O. Ry., 225 U. S. 326, 346 41

J. R. Kelly Freight Forwarder Application, 260 I. C. C. 315, 321 28

Kettenhoffen v. Glove Transfer & Storage Co., 70 Wash. 645; 127 Pac. 295; 42 L. R. A. (N. S.) 902 annot. 12

L. V. R. R. Co. v. U. S., 243 U. S. 444 13

M. K. & T. Ry. Co. v. Ward, 244 U. S. 383 .....10, 43

New York Central R. Co. v. Lazarus, 278 Fed. 900.... 41

Oregon-Washington Co. v. McGinn, 258 U. S. 409, 413 22

Prescott v. Southern Rwy. Co., 240 U. S. 632 38

Slutzkin v. Gerhard & Hey, Inc., 199 A. D. 5, 14 12

Sou. Pac. Co. v. Stewart, 245 U. S. 359 41

United States v. American Trucking Associations, Inc., 310 U. S. 534 38

U. S. v. Chicago Heights Trucking Co., 310 U. S. 344.. 25

Westinghouse Electric & Mfg. Co. v. Binghamton Railway Co., D. C. N. Y. 1919, 255 Fed. 378 48

Statutes Cited

PAGE

Uniform Railroad Bill of Lading:

Section 2(b) 7

Interstate Commerce Act:

Section 20 (11) 16, 30
Section 20 (12) 17, 30
Section 1013, Part IV 11, 20

Miscellaneous

Cong. Rec. Vol. 40, p. 9580 18
Cong. Rec. Vol. 87, Part 8, p. 8218 26
Cong. Rec. Vol. 88, Part 5, p. 6115 27
Cong. Rec. Vol. 87, Part 8, p. 8223 28
Cong. Rec. Vol. 88, Part 3, p. 4065 28
Cong. Rec. Vol. 87, Part 8, p. 8220 32
Cong. Rec. Vol. 87, Part 8, p. 8216 ..... 33, 36
Cong. Rec. Vol. 87, Part 8, p. 8227 34

Supreme Court of the United States

OCTOBER TERM 1948

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Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONERS

I. Opinions Below

The opinion of the District Court (R. 69-84) is not reported. The opinion of the Circuit Court of Appeals (R. 95-105) is reported in 166 F. (2d) 778.

II. Jurisdiction

This Court has already exercised its jurisdiction under 28 U. S. C. A., § 347(a) to review the instant case by entering, on October 11, 1948, its order granting a writ of certiorari to the Circuit Court of Appeals for the 2nd Circuit (R. 109).

III. Statement of the Case

Respondent, a freight forwarder, brought suit against petitioners, railroads, in the United States District Court for the Southern District of New York, praying for a judgment declaring that respondent as a freight forwarder is a receiving carrier within the meaning of the uniform railroad bill of lading*, that written notice of claim** to respondent within the period of nine months therein provided, satisfies the meaning and purpose of said provisions, and that after receipt of such written notice of claim, respondent, by subrogation to the claims of its shippers sustaining loss or damage in the transportation service of petitioners as respondent's connecting carriers, is entitled to recover from petitioners the amounts which respondent has been obliged to pay its shippers (R. 5).

Respondent moved in the District Court for summary judgment against petitioners Delaware, Lackawanna & Western Railroad Company, Chicago, Milwaukee, St. Paul

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* In its amended complaint (R. 2-6) respondent refers to the bill of lading the forwarder issues to shippers as the uniform railroad bill of lading. Actually, the Interstate Commerce Commission has prescribed the form and conditions of the bill of lading to be issued by railroad common carriers, commonly known as the uniform railroad bill of lading. (Copies are inserted at pp. R-18a; R-18b; R-32a; R-32b; see 14 ICC 346; 52 ICC 671.) However, the Commission has never prescribed use of the uniform railroad bill of lading for forwarders. Respondent's allegation that it issued bills of lading with like terms and conditions to its shippers is nothing more than an allegation that as a convenience to itself it has "lifted" the terms and provisions of the uniform railroad bill of lading and incorporated them into its own bill of lading.

** The amended complaint refers repeatedly to "notice" and "notice of claim" as a requirement of the uniform railroad bill of lading. Such expressions are not found in the uniform railroad bill of lading, but rather Section 2(b) thereof requires: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier * * * within nine months after delivery of the property * * * or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed * * *."

& Pacific Railroad Company and Wabash Railroad Company (R. 47; R. 65) and also moved to strike out the defenses of all the petitioners (R. 60). Petitioners, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, made a cross-motion for judgment on the pleadings (R. 60). All the above motions were argued together and in a comprehensive opinion (R. 69-84) the District Court denied respondent's motions and granted the motions of petitioners, Delaware, Lackawanna & Western Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Wabash Railroad Company, having considered them as motions for summary judgment. By stipulation and order the cross-motion of said petitioners was amended to include *nunc pro tunc* all the petitioners and to include therein a motion for summary judgment on their behalf (R. 67, 68). The final order of the Court directed judgment dismissing the complaint as against all the petitioners (R. 85, 88) and the respondent appealed to the Second Circuit Court of Appeals from that order.

On March 1, 1948 the Circuit Court rendered its decision (R. 95-105; 166 F. (2d) 778), reversing the District Court and remanding. On May 29, 1948 petitioners filed their petition for writ of certiorari and the petition was granted by this Court October 11, 1948 (R. 109).

The facts of the case are undisputed (R. 49; R. 72) and appear in the amended complaint (R. 2-6), the answers (R. 7-36A) and in the affidavits of William J. H. McEntee (R. 47-59), B. H. Wettlaufer (R. 61-65), H. W. Kerns and William C. Morrow (R. 66-67). The principal facts are as follows:

Respondent is a freight forwarder, and its business is controlled by the provisions of the Freight Forwarder Act, Part IV of the Interstate Commerce Act (49 U. S. C. A. §§ 1001, *et seq.*). Petitioners are common carriers by rail, whose business is controlled by Part I of that Act (49 U. S. C. A. §§ 1, *et seq.*) (R. 2).

The business of the respondent as a freight forwarder, subject to the provisions of Part IV consists of holding itself out to provide transportation of property in interstate commerce. It solicits and receives from various shippers at various assembly points less-than-carload shipments of freight, for the handling of which respondent maintains facilities in the principal cities of the United States. It operates neither rail lines, ships nor motor trucks. In the course of its undertaking of assembling and consolidating shipments, it performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, assumes responsibility for the transportation of such property from delivery of each individual package to it or to a local truckman or a motor carrier until delivery of each package by it or by a local truckman or a motor carrier to the consignee of such package, and utilizes for the whole or part of that transportation the service of carriers which are subject to Parts I, II or III of the Interstate Commerce Act (R. 3, 9, 23).

Individual less-than-carload shipments are either trucked by the consignor or a local truckman to respondent's assembly points or are transported there by motor carrier. In instances of the former, respondent issues to the consignor its bill of lading showing the name of the consignor and the consignee and destination. In instances of the latter the motor carrier issues to the consignor its bill of lading showing the name of the consignor and of the consignee and destination and the respondent adopts the motor carrier's bill of lading as its own as the Statute permits (49 U. S. C. A., § 1013) or on occasion the motor carrier issues a bill of lading in the name of respondent (R. 3, 10, 24).

At the assembly point, respondent sorts the individual package shipments and consolidates them into a volume quantity which is then shipped as a carload shipment by railroad or as truck load shipments by motor common car-

rier to a distant destination which is usually a distribution location of respondent or an associated forwarder (R. 3, 11, 24).

The railroad does not transport such railroad carload shipments under the many bills of lading issued by respondent or the motor carrier to the individual package consignors, but in all instances the railroad issues its own uniform railroad bill of lading to respondent showing respondent as shipper and consignee and the shipment as being a "carload of mixed merchandise". In most instances the uniform railroad bill of lading is stamped "Shipper's load and count" in accordance with the provisions of the Federal Bills of Lading Act (49 U. S. C. A. § 101). The destination named in this uniform railroad bill of lading is a rail destination at which respondent has arranged to take delivery of the carload shipment. Neither the names of the individual package consignors to whom respondent or the motor carrier issued its bills of lading, nor the names of the individual package consignees to whom respondent agrees to deliver the individual packages appear anywhere on the uniform railroad bill of lading issued to the respondent (R. 11, 25).

The transportation of carload shipments by the railroad for respondent is made pursuant to the regularly filed and published classification, tariffs and supplements (R. 67) of the railroad applicable to similar carload shipments of the public generally; the rates charged by the railroad are the regular rates for such carload traffic; respondent is dealt with and treated by the railroad in the same manner as any other shipper or consignee; charges based on the regular tariff rates are either prepaid by respondent to the railroad or paid by respondent to the railroad on delivery to respondent of the carload shipment at the rail destination as in the case of any other shipper or consignee (R. 12, 25).

Upon delivery by the railroad of the carload shipment to respondent at the rail destination, respondent sorts the

carload shipment into its individual component package shipments and delivers, in some instances, the various articles so sorted, by a local truckman or a motor carrier to the individual consignees of each package. However, in other instances respondent reassembles parts of said carload shipment, combines them with other individual package shipments on hand and makes up either a new truckload for further shipment by a motor carrier to a new distant destination or a new carload shipment for further movement by railroad as a new carload shipment. In the latter instance the railroad always issues to respondent a new uniform railroad bill of lading showing respondent as the shipper and consignee as on the first such movement described above (R. 10, 26).

In this manner respondent does business, obtaining transportation across large areas of the country by shipping less than carload freight consolidated into truckload and carload quantities and using motor carrier transportation, or rail transportation or a combination of the two.

The rates charged by railroads on carload shipments are lower than the aggregate charges would be if each of such package shipments were tendered to the railroad as individual less-than-carload shipments. The respondent, however, charges and collects from its shipper or consignee a sufficient tariff charge on each shipment so that the saving it makes in shipping by rail in carload quantities or by motor carrier service in truckload quantities is a sufficient margin to carry on business and make a profit. The railroads do not receive from respondent the charges collected by respondent from its shippers, nor any part thereof; nor do the railroads participate in any division or apportionment of such charges. Conversely the railroads do not share or divide the freight charges collected from respondent with anyone excepting connecting rail and water carriers with which joint through rates and routes are published (R. 13, 27).

The transportation of the carload shipment by the railroad is not on any through routing provided for in the bills of lading issued by respondent or the motor carrier to the package shippers. Rail routing does not appear in such bills and the railroad has no knowledge of such bills and their contents when it accepts and transports the consolidated carload shipment for respondent nor at any time. The uniform railroad bill of lading issued by the railroad to respondent on the carload shipment provides for rail routing only for the carload shipment between rail point of origin and rail destination of such carload shipment (R. 14, 25).

As to claims for loss and damage occurring on a carload rail shipment the uniform railroad bill of lading governing such transportation provides that as a condition precedent to recovery, claim for loss or damage must be filed in writing within nine months of delivery or a reasonable time for delivery; otherwise the claim will not be paid.* During all the times mentioned in the complaint it has been the uniform practice of respondent to comply with this provision of the uniform railroad bill of lading issued to it by filing claims *as shipper.* Respondent has never attempted first to pay a claim to its individual package

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* Section 2(b) of the Uniform Railroad Bill of Lading provides as follows:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

shipper or consignee and then assert a right-over against a rail carrier and ask reimbursement based upon a judgment, or transcript thereof, procured against respondent or based upon a receipt for a sum paid out, as it is herein asking the court to declare it is entitled to do (R. 15, 29, 63).

Respondent's method of doing business as above described is the same as that found to exist and described in *Acme Fast Freight* v. *U. S.*, 30 F. Supp. 968, affirmed 309 U. S. 638. In that case, decided before the enactment of the Forwarder Act, it was held that respondent was not a common carrier.

There is nothing in the amended complaint or in the proceedings thus far had indicating that any change has taken place in respondent's practices and operations as a freight forwarder subsequent to the enactment of the Forwarder Act in 1942 and the District Court below so found (R. 77). Although, the respondent has always been a shipper in its relations with the carriers, its contention herein is that Section 1013 of Part IV of the Interstate Commerce Act (49 U. S. C. A., § 1013) has brought about a change in its status, *i. e.*, it has become an "initial carrier" as to the package shipments of its shippers; that there is no difference in substance or in form between the package shipments of its various shippers and the consolidated carload shipment which it delivers to the rail carriers for rail transportation in respondent's name; that the rail carriers are its connecting carriers; that the filing of claim with respondent, forwarder, by its individual package shippers, satisfies the claim clause provision of the uniform railroad bill of lading requiring claims to be filed with the "initial carrier"; and as "initial carrier" respondent need not file claims with the "connecting carrier" railroads, but can recover against them under Section 1013 for payment of any claims made against respondent by any of its shippers (R. 29, 63).

IV. Question Presented

The question presented by this controversy is whether, since the inclusion of Part IV in the Interstate Commerce Act the relationship between the rail carrier and the forwarder, shipping a consolidated carload shipment by rail under the terms and provisions of the uniform railroad bill of lading wherein the forwarder is shipper and consignee, is (1) that of shipper and common carrier by rail governed by the terms and provisions of such uniform railroad bill of lading or (2) whether such relationship is that of receiving carrier and connecting carrier governed by the terms and provisions of the various bills of lading issued by the forwarder or its agents to the package shippers who are unknown to the rail carrier.

V. Specification of Errors

Petitioners urge all of the errors specified in the petition to this Court for writ of certiorari in this case. In that petition it was specified that the Circuit Court of Appeals in the Second Circuit had erred:

1. In reversing the judgment awarded in favor of the petitioners dismissing the complaint on the merits.

2. In failing to affirm the judgment below.

3. In failing to hold that the respondent is in all respects bound by the terms of the uniform railroad bill of lading issued to it by the rail carriers for the transportation of the consolidated carload shipment, including the requirement that claims be filed in the manner and time therein specified.

4. In holding that the respondent never has been and was never intended by Congress to become a car-

rier, and at the same time holding that the respondent was an initial carrier.

5. In failing to hold that the respondent was not an initial carrier as to the shipments transported by the rail carriers but was a shipper only, as to such shipments, subject to the rail carriers' carload rates and the terms and provisions of the uniform railroad bill of lading.

6. In holding that the petitioners are bound, in the transportation of the carload shipments received from the respondent, by the terms of the bills of lading issued by the respondent to its individual package shippers, on each package shipment subsequently consolidated into such carload shipments.

7. In holding that the doctrine of *M. K. & T. Ry. Co. v. Ward*, 244 U. S. 383, and similar cases is applicable to the factual situation in this case so as to render void the terms and provisions of the uniform railroad bill of lading issued to respondent forwarder by the rail carriers.

8. In failing to hold that the bills of lading issued by respondent to its customers for the individual package shipments are not through uniform railroad bills of lading and that the petitioners are not parties thereto.

9. In holding that on forwarder traffic, as involved in this case, the rail carriers are connecting carriers only.

10. In failing to hold that the uniform railroad bill of lading issued to respondent forwarder has the effect of limiting any right of recourse or of subrogation, if such right is granted to respondent under Section 1013 of the Interstate Commerce Act, so as to obligate respondent to comply with the claim clause in such bill of lading.

Summary of Argument

This brief for petitioners is written with the purpose of establishing that the relationship between forwarders and rail carriers is, since the enactment of Part IV of the Interstate Commerce Act, as it was prior thereto, that of shipper and common carrier by rail, governed by the terms and provisions of the uniform railroad bill of lading; that forwarder's carload shipments moving by rail are governed by the terms of the uniform railroad bill of lading; and that the forwarder, being a shipper, and shipping under the terms and provisions of the uniform railroad bill of lading, cannot avoid the full application of its terms and conditions, including Section 2(b) thereof.

The petitioners advance the following arguments:

1. **Congress in its enactment of Part IV of the Interstate Commerce Act intended that a freight forwarder should retain its dual personality, i. e., (1) that of a transportation company with respect to its package shippers and (2) that of a shipper with respect to the rail carriers, whose services it utilizes. Being a shipper of its carload rail shipments, it cannot avoid compliance with the terms and provisions of the uniform railroad bill of lading.**
2. **The rail transportation of the forwarder's carload of mixed merchandise could not lawfully be effected except under the terms of the uniform railroad bill of lading issued by the initial rail carrier on such carload shipment.**
3. **The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" with respondent and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.**
4. **Respondent, a shipper as to the rail carriers, has no right-over against rail carriers under Section 20(11) as incorporated into Section 1013 of Part IV. Were respondent an "initial carrier" as to the railroads any claimed right-over under Section 20(12) is regulated, modified and limited by agreement *i. e.*, Section 2(b) of the uniform railroad bill of lading issued to respondent.**
5. **Conclusion.**

POINT I

Congress in its enactment of Part IV of the Interstate Commerce Act intended that a freight forwarder should retain its dual personality, i. e., (1) that of a transportation company with respect to its package shippers and (2) that of a shipper with respect to the rail carriers whose services it utilizes. Being a shipper of its carload rail shipments, it cannot avoid compliance with the terms and provisions of the uniform railroad bill of lading.

A. Relationship of forwarder to rail carrier prior to 1942.

Prior to the enactment of the Forwarder Act (Part IV, Interstate Commerce Act, 49 U. S. C. A. §§ 1001, *et seq.*) freight forwarders such as the respondent occupied a unique position in the transportation industry. The modern freight forwarder had become possessed of a dual personality.* With respect to its relations with its package shippers (of the miscellaneous package shipments which the forwarder consolidates into a carload) it was a transportation company; while with respect to the rail carrier to whom it delivered its consolidated carload shipment for transportation, in its own name as shipper and consignee, it was a shipper only.

The Interstate Commerce Commission in its report of its investigation of the forwarder business, which preceded

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* In the early law, the forwarder was considered merely an agent for the shipper; with the broadening of the scope of its activities, particularly its agreement to provide transportation from origin to destination, it acquired some aspects of a common carrier in relation to its shippers (see *Kettenhoffen v. Glove Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295; 42 L. R. A. (N. S.) 902 annot.; *Slutzkin v. Gerhard & Hey, Inc.*, 199 A. D. 5, 14; *Highway Freight Forwarding Co. v. Public Service Com.*, 108 Pa. Sup. Ct. 178, 164 Atl. 835).

the enactment of Part IV, said:

> "We find that the forwarder as described upon this record, in its relation to the rail lines, is a shipper.
>
> "We further find that the forwarder as described upon this record, in its relation to the public, has characteristics of a common carrier transportation agency and that its regulation as such is not comprehended within the provisions of Part I or Part II of the Act."
>
> *Freight Forwarder Investigation*, 229 I. C. C. 201, 304 (1938).

As such shipper it was, in using railroad services, subject to all the published classifications and tariffs of the railroad and the terms of the uniform railroad bill of lading issued to it, just as in the case of any other shipper.*

The railroad had to treat respondent as any other shipper and could neither give respondent a preference nor discriminate against it.

> *I. C. C.* v. *D. L. & W. R. R. Co.*, 220 U. S. 235;
> *L. V. R. R. Co.* v. *U. S.*, 243 U. S. 444.

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* In *Freight Forwarder Investigation*, 229 I. C. C. 201, 297, it was said:

> "It has long been the law that the carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed." *California Commercial Assn.* v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 427; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444. The consolidated consignment with which we are here dealing is shipped over the railroad by the forwarder in its name and to itself as consignee. The forwarder, therefore, is the only shipper or consignee known to the railroad in so far as this traffic is concerned. It must be, therefore, that the forwarder as it now operates, in its relation to the railroads, is a shipper."

Forwarders such as the respondent have never been considered carriers in their relationship to rail carriers.*

B. Enactment of law regulating forwarders.

Congress deemed that the business of forwarders required regulation in order to carry out the National Transportation Policy** and in 1942, after much discussion in both the Senate and House, enacted the Forwarder Act,

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* Both the District Court and the Circuit Court of Appeals were in agreement on this point, i. e., that the respondent is not and cannot be a *carrier*. While it may have aspects of a transportation company with respect to its shippers it must remain a shipper in its relations with rail carriers in order to justify its very existence. Its dual personality, by which it can collect shipments for transportation at its own rates, consolidate them and deliver them to the rail carriers for transportation to itself at a lower rate, provides the income and the justification for the existence of such forwarder (Freight Forwarder Investigation, 229 I. C. C. 201, 298).

** National Transportation Policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12, and 13 of this title, by inserting before Part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

which became Part IV, Interstate Commerce Act (49 U. S. C. A. §§ 1001, *et seq.*).

Since 1886, railroads had been subject to federal regulation under the Interstate Commerce Act (49 U. S. C. A. §§ 1, *et seq.*). In 1935, motor carriers were made subject to federal regulation; the Interstate Commerce Act was thereupon split into parts, the sections regulating motor carriers, being Part II. Subsequently water carriers were made subject to Commission regulation and the sections relating to that type of carrier became Part III. The reason for the separation of the Act into Parts is obvious: motor carriers are neither railroads nor water carriers; water carriers are neither motor carriers nor railroads. Each form of transportation had a nature peculiar to itself and different from the others' and the problems of regulation were different. Had the transportation services of motor carriers and water carriers been similar to railroads there would have been no need for a Motor Carrier Act or a Water Carrier Act, nor the enactment of a distinct statute applicable to each *i. e.*, Part II and Part III respectively of the Interstate Commerce Act. Congress could merely have enacted a law making motor carriers and water carriers subject to regulation by the Commission under the then existing provisions of the Interstate Commerce Act (now Part I).

Similarly, in enacting legislation making forwarders subject to government regulation, if the forwarder was to be a common carrier performing transportation services similar to that of railroads, Congress could merely have so declared and made the forwarder subject to the provisions of the Act applicable to railroads (Part I). This Congress did not do. It made the forwarding business subject to the jurisdiction of the Commission but in a separate statute to be known as Part IV of the Interstate Commerce Act which was to apply to and only to "service subject to" such new Part. The reason is obvious: the railroad is a

common carriers the forwarder is not. As to the railroad transportation services which the forwarder utilizes, *i. e.*, in its relationship with rail carriers, the forwarder is a shipper.

C. Railroad liability under Section 20 (11) of the Interstate Commerce Act.

A consideration of the relationship of common carrier railroads, *inter sese*, and their liability to shippers for loss and damage on freight transported is at this time helpful in an orderly presentation of the issues involved in this action and in explanation of the National Transportation Policy, conformity with which is the fundamental test to be applied to the controversy herein.* The statute as amended governing such relationship and liability is commonly referred to as the Carmack Amendment.

Section 20(11), 49 U. S. C. A., § 20(11), in substance, provides:

> "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation. * * * shall issue a receipt or bill of lading therefor, and shall be liable * * * for any loss, damage or injury to *such property* caused by it or any common carrier, railroad, or transportation company to which *such property* may be delivered * * * when transported on a *through* bill of lading * * * and any such common carrier, railroad or transportation company so receiving property for transportation * * * or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable * * * for the full actual loss caused by it or by any such common carrier, railroad or transportation company to which *such property* may be delivered * * * when transported on a through bill of lading * * *." (Italics supplied.)

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*See footnote **, p. 14 *supra*.

Section 20(12), 49 U. S. C. A. § 20, provides:

> "The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property *so received and transported*, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of *such property*, as may be evidenced by any receipt, judgment, or transcript thereof * * *." (Italics supplied.)

It should be noted that under Section 20(11) above, the initial common carrier, railroad or transportation company is liable for loss or damage occurring anywhere in the transportation only when the transportation is on a *through* bill of lading. The right-over of such initial common carrier railroad or transportation company in the event of its payment or liability to payment of a claim, to recover from the common carrier, railroad, or transportation company on whose line the loss or damage occurred is dependent upon the latter having transported the shipment on its line and pursuant to the *through* bill of lading. Respondent does not bring itself within such requirement because the transportation by rail is not under the terms and provisions of any of the bills of lading issued by respondent or its agent but rather under the terms and provisions of the uniform railroad bill of lading.

Prior to the effective date of the Carmack Amendment of 1906, railroads were so associated in practice in the handling and interchanging of traffic that a shipment, carload or less-than-carload, could be made from practically any point in the United States to practically any other point, as if over one continuous line; and by the publication of tariffs the railroads had often joined one with another to provide through routes, with joint or through rates applicable to shipments over such routes. Nevertheless, it

was common practice for each railroad to limit its liability solely to the transportation over its own line. The initial rail carrier in making the contract with the shipper for the through transportation might limit its liability for damage to that occurring on its own line; it could agree not to be liable for damage caused by any connecting or subsequent rail carrier. To remedy this condition the Carmack Amendment of 1906 (now Section 20(11) and (12), 34 Stat. 595, Chap. 3591) was added to the Interstate Commerce Act (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186);* and imposed on the initial rail carrier an undertaking it previously might avoid by making it liable for damage occurring on any other railroad over which the shipment was moving on a uniform railroad bill of lading between the origin and destination named therein.** Because the railroads, in practice, operated as one system on through routes, with joint or through rates frequently established, their method of doing business made necessary the imposition of initial railroad liability to the shipper, and the

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* Congressman Richardson in explaining the purpose of the Amendment to the House, said (40 Cong. Rec., p. 9580) as to the reason for making the initial carrier responsible for loss or damage:

> "The reasons for inducing us to do that were the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and the settlement between them will be an easy matter, while the shipper would be at a heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the cooperation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference."

** The requirement in the present wording of Section 20(11) that the respective liabilities of the rail carriers to the lawful holder of the bill of lading and *inter se* is dependent upon the property being transported on a *through* bill of lading was not in the Carmack Amendment as enacted into law in 1906. That provision was added by the First Cummins Amendment in 1915.

initial railroad was compensated with the right over (Section 20(12)), against the railroad at fault (*Atlantic Coast Lines* v. *Riverside Mills* (*supra*)).

Prior to enactment of the Forwarder Act (49 U. S. C. A. §§ 1001, *et seq.*) the Carmack Amendment had no application to the contracts between the forwarder and its individual package shippers, even though the forwarder had, after consolidating the package shipments into a carload quantity, shipped such carload over railroad lines under the terms and provisions of the uniform railroad bill of lading. The Carmack Amendment (49 U. S. C. A. § 20(11)) did apply to the contract made between the forwarder *as shipper* and the railroad. The rights and liabilities as between the freight forwarder (as shipper of such carload shipment) and the rail carriers were governed by the uniform railroad bill of lading and Section 20(11).

The contracts the forwarder made with its individual package shippers were not binding on the railroads, the railroads were not parties to such contracts and the railroad transportation of the carload shipment was not under or pursuant to such contracts. As in the case of any other shipper, the terms of the uniform railroad bill of lading issued by the railroad to the forwarder as shipper of a carload shipment governed the transportation. Thus, when loss or damage occurred, and the forwarder's individual consignor attempted to sue a railroad, the uniform railroad bill of lading which had been issued to the forwarder became the sole measure of the railroad's contractual liability.

Great Northern Ry. Co. v. *O'Connor*, 232 U. S. 508.

D. The Forwarder Act of 1942 did not and was not intended to change the existing status.

(1)

The underlying theory of respondent's position herein is that, since enactment of the Forwarder Act in 1942, respondent, when it issues its bill of lading to its consignor on a package shipment becomes the "initial" or receiving "carrier" of the shipment; that when it subsequently ships via railroad facilities a carload quantity comprised of a consolidation of a large number of such small package shipments, the railroad becomes respondent's "connecting carrier" as to each and every unit or package shipment comprising the carload; and that the uniform railroad bill of lading issued by the rail carrier as required by Part I of the Interstate Commerce Act is a nullity and of no force and effect.

The specific provision of the Forwarder Act which respondent contends transforms the forwarder from shipper to "initial" or "receiving carrier" is the following of Section 1013 (49 U. S. C. A., § 1013):

> "§ 1013. The provisions of Section 20(11) and (12) of Part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, *in the case of service subject to this part*, with like force and effect *as in the case of those persons to which such provisions are specifically applicable*, and the freight forwarder shall be deemed both the receiving and the delivering transportation company for the purposes of such Section 20(11) and (12). * * *" (Italics supplied.)

Respondent's argument amounts to the contention that the passage of Section 1013 changed the relation between

forwarders and rail carriers, made the forwarder an initial carrier or transportation company as to rail carriers, abrogated the provisions of Part I of the Interstate Commerce Act requiring rail carriers to issue uniform railroad bills of lading for all shipments received by them and wiped out respondent's status as a *shipper*. That argument is predicated upon the fact that Section 1013 regulates forwarders, i.e., since the forwarder is made to respond to its shippers by that statute, then it has a statutory right of "recovery over" against the rail carriers. However, Section 1013 regulates a forwarder in its aspect of a transportation company, *not* in its aspect of a shipper. That Section cannot give a forwarder immunity from the duties and obligations which arise from its relationship as *shipper* with rail carriers or relieve the rail carriers from their statutory obligation to issue to respondent a uniform railroad bill of lading and to comply with the provisions thereof. The dual personality which exists in the forwarder type of transportation company must not be lost sight of in considering this issue for it gives the key to the meaning of the statute and to the Congressional intent.

No such result as contended by the respondent could have been legally or practically intended by Congress and so to construe Section 1013 would be revolutionary, if not catastrophic to the National Transportation Policy. Insofar as the forwarder is regulated as a transportation company, it can recover over under Section 1013 against any other transportation agency with which it deals in its capacity of a transportation company and with which it publishes through rates and routes. It cannot, however, recover over under Section 1013 against a rail carrier for no through rates and routes are published or are permitted to be published by rail carriers and forwarders and the forwarder does not in its transactions with a rail company deal with it as a transportation company but contractually as a shipper.

Section 20 (11) (49 U. S. C. R. § 20(11)) as amended by the First and Second Cummins Amendments brought about the regulation of initial rail carriers—not as between carriers—but in their relations with their shippers. The relation of connecting rail carriers as between themselves and the relation between the shippers and connecting carriers where the rates and routes were published remained unaffected (*Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409, 413).

Section 20(12) (49 U. S. C. A. § 20(12)) gave a right-over to the initial or delivering rail carrier, which was called upon to satisfy the claim of the shipper or consignee, as against the rail carrier on whose line the loss or damage actually occurred. *Atlantic Coast Lines* v. *Riverside Mills, supra.* The enactment of Sections 20(11) and (12) did not affect the status of the shipper or change his relation to the carriers in respect to his contract obligations. The shipper might recover against the initial or delivering carrier but he was still the shipper and bound by the terms of the uniform railroad bill of lading issued by the initial rail carrier—whether he sought to recover from the initial carrier or delivering carrier under the statute or from the connecting rail carrier under its common law liability (*Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190).

Likewise, the enactment of Section 1013 was not meant to change or affect the status of the forwarder in the case *where it is a shipper, i.e.*, in its relationship with rail carriers. The very section itself limits the application of Sections 20(11) and (12) so that they apply "* * * with like force and effect as in the case of those persons to which such provisions are specifically applicable * * *." Section 20(12) which is the one giving the right of recovery over and upon which the respondent relies is not "specifically applicable" to shippers in Part I. In fact it is not applicable to shippers at all. Therefore, Section 20(12) as

incorporated into Part IV from Part I by Section 1013 has no application to forwarders as shippers.

The enactment of Section 1013 did, however, affect the forwarder in its relation as a transportation company—in its dealings *with its shippers* and with those motor carriers and other forwarders whose contracts were either issued on its behalf or adopted by the forwarder.* In its relations with the latter—the motor carriers and other forwarders—the transportation provided by the forwarder was and is done on its contracts with its shippers. It is to be borne in mind that in all forwarder traffic some forwarder transportation and service to the shipper both precedes and follows the rail carriage, if there is a rail movement. It is the transportation and service other than the rail transportation that is subject to Part IV and makes necessary the application of Section 1013. As there is no contractual liability on the part of the motor carrier or other forwarder handling the shipment for the freight forwarder, at either origin or destination or for all or part of the through movement, to indemnify the freight forwarder for any judgment or liability, it might be called upon to pay for loss or damage occurring while the shipment is in the possession of such motor carrier or other forwarder, whose bill of lading the freight forwarder may have adopted, it was necessary for Congress to adopt Section 1013.

With respect to rail carriers an entirely different picture obtains—based upon the dual capacity and personality of this two sided transportation company, the forwarder. With respect to forwarders' transactions with rail carriers, *as shippers*—there is a contractual liability of such rail carriers, under the initial rail carrier's uniform railroad bill of lading and Section 20(11) of Part I of the Interstate Commerce Act which gives full recovery to the forwarder, *as shipper*, for any loss or damage to its carload shipment

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* For practices in issuance of bills of lading pursuant to Section 1013, see footnote *infra*, p. 26; also *Bills of Lading of Freight Forwarders*, 259 I. C. C. 277.

which may have occurred while in the possession of the rail carriers. As shown by the facts in this case, which are the same as those before the Court and the Interstate Commerce Commission in *Acme Fast Freight* v. *U. S.*, 30 F. Supp. 968, affirmed 309 U. S. 638, and *Freight Forwarder Investigation*, 229 I. C. C. 201, the only relation which the forwarder has, or can have with the rail carriers (whether the initial, delivering or connecting rail carrier) is the relationship of shipper.

A consideration of the various sections of the Forwarder Act (49 U. S. C. A. §§ 1001, *et seq.*) further shows that that Act was not intended to change the status of a forwarder in its relations with the railroads from that of shipper to that of initial carrier.

(a) A freight forwarder is defined in Part IV as follows (49 U. S. C. A., § 1002 (5)):

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to Chapter 1, 8 or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to Chapter 1, 8 or 12 of this title."

(b) By Section 1009 the forwarder was authorized to continue for a time the existing joint rate arrangements with motor carriers subject to Part II of the Interstate Commerce Act pending establishment of assembling and distribution rates.* By amendments this period of time was extended until by amendment of February 20, 1946, authorization for continuance of the joint rate and division arrangements between forwarder and motor carrier was granted without restriction as to expiration date, subject to the authority of the Commission.**

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* From the explanation of the Forwarder Bill to the House by Rep. Wolverton (87 Cong. Rec. Part 8, pp. 8218-19) it appears: Forwarders were closely identified with the motor carrier industry; through-routing, common arrangement and division of the through rates were the general practice; with regulation of motor carriers (1935) the joint rate tariffs were held unlawful by the Commission, the forwarder not being deemed within the Act (the Commission was upheld: *Acme Fast Freight Inc.* v. *U. S.*, 30 Fed. Sup. 968, aff. 309 U. S. 638); the Commission likewise was upheld in suspending motor carrier proportional rate tariffs on forwarder service (*U. S.* v. *Chicago Heights Trucking Co.*, 310 U. S. 344); however, the orders suspending such tariffs were extended and never made effective; that in drafting the Forwarder Act cognizance was taken of existing practices and continuance of forwarder-motor carrier service under joint rates agreements was authorized for a period of 18 months. In anticipation of discontinuance of such joint rates, assembling and distribution rates (i. e. pick-up and delivery rates) were permitted to be published and to be permanently effective; it was believed that authority for such rates, which required publication, was a better solution than a joint rate because division agreements are not required to be published; the railroads and water carriers were permitted under Section 1008 to publish assembling and distribution rates in forwarder service in order to equalize their advantages with motor carriers.

** From the House Report of Rep. Boren accompanying H. R. 2764 (amendment to Section 1009 and which became law Feb. 20, 1946) it appears: that the joint rates arrangements between forwarder and motor carrier were still continuing; that the assembly and distribution rates provided for by Section 1008 in 1942 had never been published due to failure of agreement as to same; that the joint rates arrangement were to be continued with power in the Commission to suspend same, or substitute assembly and distribution rates. (Report No. 1516; H. R. 2764; 79th Cong. 2nd Session.)

But nowhere in the Forwarder Act (Part IV) or in Part I (Railroads) is authority granted by Congress for the forwarder and a railroad to enter into joint or through rate or through route arrangements.* In the absence of such authority, these are prohibited (*Acme Fast Freight Inc.* v. *U. S.*, 30 Fed. Supp. 968, at 97[illegible] aff. 309 U. S. 638).** And the prohibition indicates clearly an intent to preserve the shipper status of the forwarder in its relations with rail carriers.

(c) No authority is found in either Part I or Part IV for a railroad to give any untlue or unreasonable preference or advantage to a forwarder, either in rates or practices. In fact, Section 1004(c) specifically prohibits any such preference or advantage, and in so doing envisages the continuance of the shipper status of a forwarder in its relations with rail carriers.

(d) Nowhere in Part IV is a forwarder referred to as a "common carrier" or even "carrier". As originally enacted, Part IV referred to a forwarder as "carrier" in only one place (Section 1017(b)), and that occurred through an error in drafting. That error was promptly

*Congressman Wolverton in a report to the House on October 23, 1941, on the bill which later became the Forwarder Act (49 U. S. C. A. § 1001), said (Cong. Rec. vol. 87, Part 8, p. 8218):

> "The maintenance of a joint rate by a carrier and a shipper would be an absurdity. If nevertheless permitted, it would enable such shipper to receive rebates through the medium of divisions of the joint rate."

**However, both motor carriers (49 U. S. C. A. § 316(c)) and water carriers (49 U. S. C. A. § 905(b)) are authorized to enter into joint rate and through route arrangements with railroads.

corrected by Congress through an amendment striking the word "carrier" and substituting "freight forwarder".*

In fact, Congress, in its definition of a forwarder (Section 1002(5)) specifically excluded it from the category of a common carrier or carrier:

> "The term 'freight forwarder' means any person which (*otherwise than as a carrier subject to* Part I, II or III of this title) * * *". (Italics supplied.)

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* As originally passed and effective May 16, 1942, Section 1017 (b) referred to the forwarder as "carrier". An amendment to this section, effective August 6, 1942, struck out "carrier" and substituted "freight forwarder". In explanation of this amendment (S. 2642) Senator Reed said (Cong. Rec. Vol. 88, Part 5, p. 6115) that the drafting service had made a mistake as to that one word and the purpose of the bill was to correct the error, and continued:

> "When we passed the so-called freight forwarders' legislation there was some question as to whether or not a freight forwarder was a common carrier. The Senate bill offered no difficulty with that subject. We did not treat a freight forwarder as a common carrier. We passed Senate bill 210, which went to the House and was referred to the Committee on Interstate and Foreign Commerce. In the House there were a number of bills dealing with the subject. The House struck out everything after the enacting clause and substituted one of its own bills.
>
> "When the conference committee finished its work we thought we had a perfect bill. Later it was found that the drafting service had made a mistake as to one word, so Senate bill 2642 was introduced for the purpose of correcting that error. *At one place in the bill which was passed reference was made to a freight forwarder as a carrier. We desire to correct that reference.*" (Italics supplied.)
>
> "When Senate bill 2642 was introduced it went to the Interstate Commerce Commission. The Commission called our attention to another error which had existed in the Interstate Commerce Act for several years and suggested that the bill be amended so as to correct both errors.
>
> "There is no question involved except correcting the language of the Interstate Commerce Act in two places. In one place we propose to change the word 'carrier' to 'freight forwarder'. In another place we propose to change the words 'this part' to 'this act'".

Parts I, II and III *cover all common carriers* engaged in interstate commerce (except airplanes which are regulated under a separate Act, 49 U. S. C. A. §§ 401, *et seq.*)

(c) Nowhere in Part IV is there any express word, language or phrase stating that the status of a forwarder as to a railroad whose services it utilizes has been changed from that of shipper. On the contrary the framers of the Forwarder Act had in mind the preservation of the then existing status.*

Furthermore, Part IV is interpreted by the Commission as making no change in the status of a freight forwarder as shipper with respect to the railroads. In *J. B. Kelly Freight Forwarder Application*, 260 I. C. C. 315, 321, the Commission said:

> "* * * Nowhere in Part IV is a freight forwarder as such referred to as a 'carrier', and from the history of this statute, more particularly the various bills that were introduced in Congress and the committee

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* "Close analysis developed that in many respects freight forwarders, as regards their relations with the actual carriers, are properly to be considered not as carriers but as shippers, and because of this essential difference in character it became necessary to recommend a form of legislation in keeping with that character. Only so, could gross discriminations against other shippers be avoided."

Congressman Youngdahl, on the Forwarder Bill, Oct. 23, 1941—Cong. Rec. Vol. 87, Part 8, p. 8223.

"Even though they may assume or incur the obligations of a common carrier toward their own shippers, forwarders nevertheless stand in the role of shippers with respect to the actual carrier whose services they utilize. Such distinctions between forwarders and carriers subject to the Interstate Commerce Act made it necessary to vary, in some respects, the pattern of the regulation to be proposed for them from that which has heretofore been applied to the actual carriers of freight."

Congressman Wolverton in Conference report of May 11, 1942, Cong. Rec. Vol. 88, Part 3, p. 4065.

reports and debates thereon, it seems clear that Congress deliberately refrained from so designating freight forwarders. Prior to the enactment of Part IV, the Commission and the courts had found that in their dealings with the rail carriers freight forwarders had the status of shippers, although in their relation to the public they had characteristics of a common-carrier transportation agency. *Freight Forwarder Investigation*, 229 I. C. C. 201; *I. C. C. v. D., L. & W. R. R. Co.*, 220 U. S. 235."

(f) With respect to Section 1013 as incorporating therein Sections 20(11) and (12) of the Interstate Commerce Act, such incorporation is for a limited purpose only.* By the very terms of Section 1013, Sections 20(11) and (12) as incorporated therein are made applicable "in the case of service subject to this Part", *i. e.*, service under Part IV. Thus in the service subject to Part IV where the forwarder is performing its service to its shippers—

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* The Court below erred when it held that "* * * for the limited purposes of that section a forwarder is to be treated as a carrier" (R. 100). The intent of Congress, as pointed out heretofore, was *not* to make a forwarder, in its relations with rail carriers, a carrier. The Court itself said in speaking of the Congressional intent:

> "To subject forwarders to the control of the Interstate Commerce Commission it was not necessary to make them over into carriers, and indeed, in view of their operations, it would have been a strange linguistic feat for Congress to have done so" (R. 99).

But the holding that a forwarder is for the limited purposes of Section 1013 to be treated as a carrier, is inconsistent with the general conclusion that forwarders are not carriers. It is submitted that the Court below failed to discern the intended limit of the application of the statute, which results from the dual personality of a freight forwarder. If it had not done so the correct and only conclusion at which it could have arrived was that the application of Section 1013 is limited to that aspect of the forwarder's dual personality wherein it operates as a transportation company and wherein it deals in that capacity; i.e., (1) prior to the point at which it is a shipper over rail carriers, and (2) after the rail transportation has ceased.

as receiving or delivering transportation company—Sections 20(11) and (12) are made applicable. But those sections cannot apply to the forwarder in its character as a shipper—in its relations with rail carriers in the shipping of a forwarder's consolidated carload shipments. That Congress intended that there be such limitation on the application of Sections 20(11) and (12) as incorporated in Section 1013 is further shown from the specific language of the latter section. It provides that:

> "* * * Sections 20(11) and (12) of Part I * * * shall apply with respect to freight forwarders * * *, in the case of service subject to this Part, with like force and effect *as in the case of those persons to which such provisions are specifically applicable* * * *." (Italics supplied.)

Section 20(11) as originally enacted in the Carmack Amendment did not, and has never been construed to, fix any liability upon *shippers* in their transactions with rail carriers. Nor has Section 20(12) of the Carmack Amendment ever been construed to apply to shippers so as to give them a right-over (by subrogation or otherwise) against rail carriers.

This construction of the application of Sections 20(11) and (12) as incorporated in Section 1013 does not affect the forwarder's liability towards its shippers; nor the forwarder's rights against those carriers with whom the forwarder does not have relations of a shipper but does have the relations of a transportation company and with which it publishes through rates and routes. In other words, the liability of the forwarder with respect to its shipper is the same in any case. But to say that the freight forwarder, a shipper, has a right to recover as a receiving common carrier against rail carriers under Section 20(11) and that it has a right to "recover-over" in the same capacity against rail carriers, under Section 20(12) is to disregard the relationship existing between

the rail carrier and the forwarder under the terms and provisions of the uniform railroad bill of lading which shows the forwarder as the shipper and consignee.

The service of rail transportation is regulated in Part I of the Act and consequently rights and liabilities of rail carriers cannot constitute "service subject to this Part", i. e., Part IV.

On the other hand Part IV provides for common arrangements between different forwarders as to which the application of the Carmack Amendment and the right-over section is appropriate. For example, forwarders are permitted joint carload loading arrangement among themselves in the transportation between assembling and distribution point (49 U. S. C. A. § 1004(d)). An example of such arrangement is described in *General Carloading Co., Inc.; Freight Forwarder Application*, 260 I. C. C. 345. On such joint carload the railroad issues only one uniform railroad bill of lading with one of the forwarders described as shipper. In the event of damage to the other forwarder's shipment and payment of claim by it, it has the right-over for recovery against the forwarder to which the uniform railroad bill of lading was issued, for the latter alone can maintain an action against the railroad responsible.*

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* The incorporation of Sections 20(11) and (12) is also applicable to certain arrangements between forwarders and motor carriers. Immediately following the language contained in the first part of Section 1013 authorization is given whereby the motor carrier *may with the consent* of the forwarder execute the bill of lading for the forwarder. Under the provisions of Part II the motor carrier can issue the bill of lading in its own name on its behalf. Similarly, in making final delivery of the package shipment to the ultimate consignee, the motor carrier "may" issue the freight bill on behalf of the forwarder or under Part II the motor carrier may issue the freight bill on its own behalf. These features are common to arrangements for through routing. Nevertheless Section 1013 provides that whether the motor carrier or forwarder issues the bill of lading, regardless in whose name issued, and regardless

(*Continued on following page*)

(g) In addition, it was not the intent of the bill (S. 210, which is now Part IV) to change the then existing status, by making the forwarder thereafter "receiving carrier" as to the railroad whose services it utilizes *as shipper* and by making the railroad a "connecting carrier". We respectfully call the attention of the Court to the following excerpt from remarks of Representative Wolverton in the course of his explanation to the House of the bill and the report of the committee thereon on October 23, 1941 (Cong. Rec. Vol. 87, Part 8, p. 8220):

> "In its explanation of section 413 [49 U. S. C. A. § 1013] the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person to which such shipper is entitled to look for recovery of damages, and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company'. If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right to subrogation under section 20(12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in

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of whether the motor carrier issues the freight bill to its consignee in its own name or that of the forwarder, "* * * the freight forwarder shall be deemed both the receiving and delivering transportation company for the purpose of such section 20(11) and (12)."

Contrarywise, it is to be noted that nowhere in either Part I or Part IV is authority given to a railroad to issue to the forwarder's shippers any bills of lading in its own name or in that of a forwarder.

section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved" (p. 8220).

The statement of Representative Wolverton "that the forwarder has no right of subrogation under Section 20 (12)" goes to the heart of the case and destroys respondent's theory. Obviously recognizing this, respondent endeavors to create the impression that Representative Wolverton's remarks on this subject were of a dissenting nature, or, in other words that Mr. Wolverton disagreed with the views of the Committee as a whole. An examination of the Congressional Record dispels the view that Representative Wolverton entertained views different from those of the Committee as a whole. His remarks above quoted, correcting the report of the Committee, were made in the course of a speech in the House in explanation of the bill and of the Committee's report. He was a member of the Committee and was furthering the bill. Prefacing the remarks just quoted and his explanation of the bill, Representative Wolverton also said (Cong. Rec. Vol. 87, Part 8, p. 8216):

> "In some respects the report which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to the members of the committee or subcommittee, and therefore it may not be out of place to include in these remarks some further explanations which may be helpful to the Members in their consideration of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended.
>
> "In addition there has come to the attention of the committee certain criticisms of the bill by some of the trucking interests as to which the members would doubtless be interested in knowing the conclusions of

the committee. *For these reasons I shall endeavor to clarify the views of the committee in respect of these several matters.* In order, however, that what is said with respect to individual points shall appear in its proper relation to the subject as a whole, I think it will be of interest to the Members of the House if I first briefly sketch the development of forwarding operations in recent years". (Italics supplied.)*

(b) To summarize: Prior to the passage of the Forwarder Act the relationship between forwarder and railroad was that of shipper and carrier, and the forwarder was bound by the terms of the rail carrier's uniform railroad bill of lading. The foregoing paragraphs indicate (1) that the legislative history shows that it was not the intent of Congress in enacting Part IV to change that situation; (2) that there is no language in the Act expressly effecting a change; (3) that the definition of a forwarder negatives a change; (4) that the prohibition against preference and the

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* In presenting the bill (S. 210) for consideration of the Whole House, Committee Chairman Lea spoke briefly as to the purposes of the bill. He did not refer to the Committee Report on the bill. He was followed by Representative Wolverton, one of the members of the Committee, who made the only detailed explanation of the bill given at any session of Congress. The excerpt printed on pages 33, 34, *supra*, is from that detailed explanation. He was followed by other members of the Committee making brief statements. Neither Chairman Lea nor any other member of the Committee stated or intimated that their views or the purpose of any section of the bill were different than as stated by Representative Wolverton. At the close of discussion on the bill and before offering the bill to the full House, Chairman Lea said (87 Cong. Rec., Part 8, p. 8227):

"The gentleman from New Jersey (Mr. Wolverton) as the ranking minority member, gave unstinted work to these problems and with an ability of which every member of the committee is well aware. I appreciate his good support of this measure today as well as to the fine contributions he has made to other important measures we have brought to the House in recent years."

absence of authority for through routes or joint rates or any common arrangement for rates negatives the implication of a change; (5) that the Interstate Commerce Commission has found no change; (6) that Section 1013, upon which respondent relies, is limited in its application to "the case of service subject to this Part,"—i. e. forwarder service—and so does not effect, and was not intended by Congress to effect, a change and (7) that Section 1013 specifically limits the application of Sections 20(11) and (12) as incorporated therein to "those persons to which such provisions are specifically applicable" under Part I. Accordingly the conclusion is inescapable that as no change has been effected by the Act, the preexisting relationship between respondent and the rail carriers still obtains. Respondent is still a shipper and petitioners are still not connecting carriers; respondent is still bound by all the terms and provisions of the uniform railroad bill of lading, including the claim clause. The right of action of respondent, and its shipper, if any, against the railroad is governed by the terms and provisions of the uniform railroad bill of lading issued by the railroad to respondent.

Great Northern Ry. Co. v. *O'Connor*, 232 U. S. 508.

(2)

The effect of holding a railroad to be a "connecting carrier" to respondent under the provisions of Section 1013 would be, respondent contends, to make void the bill of lading issued by the railroad to respondent on the carload of consolidated package shipments.* If this effect did follow respondent would then be in the preferred position of not having to file any claim for loss or damage with the railroad and not being bound by any of the other terms

* But see Point II *infra*.

and provisions of the uniform railroad bill of lading. And under Section 20(12) as incorporated into Section 1013, respondent instead could then bring an action on any claim paid, or judgment paid or which it was required to pay, and would be limited as to time in such action only by the various State statute of limitations. There is no statute of limitations provided in Section 20(12) and no other provision for limitation of time in the Interstate Commerce Act is applicable.

The discrimination of such result is apparent. A forwarder is not the only type of shipper which assembles and consolidates small unit shipments into carload quantities and utilizes rail facilities to benefit by the lower carload rates. There are many types of such shipper engaged in such practice who are not forwarders and not restricted or benefited by the regulations imposed by the Interstate Commerce Act.* Congressman Wolverton in discussing these shippers in Report to the House on S. 210, the present Part IV, said:

> "For many years shippers have pooled their shipments of less-carload freight and consolidated them into carloads to obtain the benefit of the carload rates, which are lower than the less-carload rates. Some of these operations are cooperative in character; and others though handling a single general commodity such as paper or furniture, and in fact serving the same essential purpose of a cooperative, are conducted for profit among the members of a particular trade or industry." *Cong. Rec.*, Vol. 87, Part 8, page 8216.

The shippers referred to by Representative Wolverton must file claim in writing with the railroad within nine months of delivery. The resulting discrimination against such shipper and the preference thereby accorded the for-

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* See Exemptions, Section 1002(8) (3).

warder would not only be in conflict with Sections 2 and 3 (Part I) of the Interstate Commerce Act but would also be in conflict with the Forwarder Act itself. Section 1004 (c) specifically prohibits a railroad subject to Part I from giving undue or unreasonable preference or advantage to a forwarder.

It seems hardly likely that such a result, so out of harmony with the whole regulatory scheme of the Interstate Commerce Act and the National Transportation Policy, could have been intended by Congress.

The basic reason for requiring a claim in writing to be filed within nine months is to enable the railroad to make investigation while memories are fresh and records in existence. It also makes for the orderly conduct of the railroad business. But to permit respondent the right-over under Section 20(12), limited only by the local statute of limitations would place a serious hardship on the railroad. Most railroad records are destroyed after two years, unless claim be filed and the railroad has reason for keeping them.* In the matter of respondent's shipments, the railroad would in most instances be in position of defending a claim payment on which its records had been destroyed and after memories had grown stale.

Other unduly discriminatory and absurd results would follow the construction of Section 1013 contended for by respondent. For example, the railroad demurrage tariff (R. 67) provides in general that detention of a car by a

* In "Regulations to Govern the Destruction of Records of Steam Railroads" the Interstate Commerce Commission has prescribed the time within which records must be retained, by order made and entered April 20, 1945, and currently effective. The major portion of records pertaining to shipment and transportation must be retained for varying periods from one-two years; after that time the railroad is at liberty to destroy them; in practice such records are destroyed after two years, if no claim is filed or there is no reason to believe claim will be filed, because of limitation of storage space.

shipper (a) for loading and (b) for unloading, for longer than a period of 48 hours beginning at the first 7:00 A. M. after placement, renders the shipper liable for detention at so-much per day, the charge being progressive. But such demurrage is chargeable *only* to shippers or consignees. If the respondent be an "initial carrier" to the railroads, it escapes liability for this charge, and thus obtains an undue preference (*I. C. C.* v. *Chicago Great Western Rwy. Co.*, 141 Fed. 1003; affd. 209 U. S. 108; *Chesapeake & Ohio Ry. Co.* v. *U. S.*, 11 Fed. Supp. 588, affd. 296 U. S. 187).

Again, the bill of lading issued by railroads provides (Section 4(a)), (R. 34A) that in certain instances at destination after a specified period for unloading has elapsed the railroad as to the shipment has the liability of a warehouseman only in the matter of loss and damage, *i. e.*, negligence of the railroad must be proved as a fact (See *Prescott* v. *Southern Rwy. Co.*, 240 U. S. 632). The provisions of said Section 4 (a) apply to shippers (or consignees) only and if respondent be considered as an "initial carrier" and as a "connecting carrier" the railroad's liability after expiration of free time would continue to be that of a connecting common carrier as to respondent. Respondent would be the beneficiary of an undue preference under such a strained interpretation of Section 1013 and would be acquiring all the benefits accorded to a shipper under Section 20(11) and all the benefits of an initial carrier against a connecting carrier under Section 20(12).

It is an established practice in statutory construction that an interpretation which produces absurd results should be avoided. In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, it was said (p. 543):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of

themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words * * *."

It is submitted that the status of a forwarder as shipper with respect to consolidated carload shipments moving by railroad under and pursuant to the terms and provisions of the uniform railroad bill of lading issued to the forwarder by the receiving rail carrier, which has long been recognized by the Courts, the Interstate Commerce Commission and the National Transportation Policy, should not be overturned by the Courts and the forwarder held to be an "initial carrier" and a "delivering carrier" *vis-a vis*, the railroad, unless contained in an explicit legislative enactment, which is absent in this instance.

POINT II

The rail transportation of the forwarder's carload of mixed merchandise could not lawfully be effected except under the terms of the uniform railroad bill of lading issued by the initial rail carrier on such carload shipment.

The property tendered to respondent for which it or its associated motor carrier issues a bill of lading is not the same property that is tendered to the railroads. Respondent receives a less-than-carload lot. What respondent delivers to the petitioners is not that less-than-carload lot, but a combination of such less-than-carload lots, which

is delivered to the petitioners as a carload shipment. It necessarily follows that the railroad does not transport the same less-than-carload shipment on the bill of lading issued by the forwarder to the package shipper. The less-than-carload or package shipment is consolidated by the forwarder with multifarious other package shipments, and then the consolidated bulk—in which the individual units have lost their identity—is tendered to the initial rail carrier as a new, single, independent carload shipment. On this new shipment there is issued to the forwarder by the railroad the prescribed uniform railroad bill of lading showing respondent (not respondent's numerous consignors) as shipper and consignee of the carload. The shipment is described as "carload of mixed merchandise", and the destination is shown as a rail destination at which respondent forwarder has a place of business, and at which destination delivery is made by the railroad to the forwarder as consignee. The individual names of respondent's individual shippers or consignees do not appear on the uniform railroad bill of lading issued by the railroad to the forwarder and neither does the origin and final destination of any package shipment. The railroad has no knowledge or information as to such facts.*

When a railroad receives a carload shipment from a forwarder there must be a uniform railroad bill of lading issued by the railroad on such carload shipment. It could not be otherwise, for if the shipment received by

*The Consolidated Freight Classification (R. 67) to which petitioner railroads are a party, which is published and lawfully on file with the Commission, and which contains the rules and regulations under which shipments are received and transported, provides (Rule 7) that the name of only one shipper, one consignee and one destination may appear on a uniform railroad bill of lading, and (Rule 14) that only one uniform railroad bill of lading may be issued on a carload shipment and such shipment must be in one car, from one station made in one calendar day by one shipper for delivery to one consignee at one destination car to be loaded by shipper and unloaded by consignee (Exhibit "C", R. 36A).

respondent forwarder were tendered to a railroad the freight charges necessarily imposed by the railroad would be at the less-than-carload rate. The less-than-carload shipment could not be reshipped by the railroad at carload rates without violating the law (49 U. S. C. A. § 2 and § 1004(c)). The railroads do not and cannot transport a forwarder's consolidated carload shipment on the several less-than-carload bills of lading issued by the forwarder; but such rail transportation must be made on the uniform railroad bill of lading issued by the initial rail carrier to the forwarder covering the carload lot. So long as the forwarder obtains, on the forwarder's consolidated carload shipments, the carload rate from the rail carriers (a factor which establishes both the excuse for the existence of this two-sided character in the transportation industry, as well as the fact of the complete difference in identity between the consolidated carload shipment and its individual units) a uniform railroad bill of lading must be issued by the initial rail carrier to the forwarder. 49 U. S. C. A. 20(11). If the rail carrier did not actually issue a uniform railroad bill of lading, nevertheless the forwarder's shipment, being accepted as that of a shipper of a carload shipment moving by rail, the uniform railroad bill of lading being a part of its tariffs could not be waived by any such failure to issue. *New York Central R. Co.* v. *Lazarus*, 278 Fed. 900; *Sou. Pac. Co.* v. *Stewart*, 245 U. S. 359.

Even if the respondent were a carrier, its consolidated shipments could not be transported except under and pursuant to the terms of the uniform railroad bill of lading as issued by the initial rail carrier to the forwarder. If a rail carrier should assume to act as a shipper of a consolidated carload shipment it would not be entitled, as to that shipment, to any waiver of the claim clause in the uniform railroad bill of lading of the initial rail carrier accepting such consolidated carload shipment. A carrier cannot be made a favored shipper. *Interstate Commerce Commission* v. *Balt. & O. Ry.*, 225 U. S. 326, 346.

If the railroad received and transported as individual less-than-carload shipments each of the individual package shipments comprising the forwarder's consolidated bulk shipment, the regular railroad tariff less-than-carload rates would be applicable to each individual package shipment. The aggregate of this amount would be considerably greater than is the carload rate paid by respondent on the consolidated bulk carload shipment which it offers to the railroad as a "carload of mixed merchandise".

In other words, there are different shipments, different rate structures, different routes, different points of origin, different destinations, different shippers, different consignees, different divisions of freight charges, and the bills of lading are issued to different persons. The terms and conditions of the bills of lading issued by respondent or its agent and the uniform railroad bill of lading issued by the rail carrier receiving the consolidated carload shipment may be similar because respondent has presently adopted (see footnote, p. 2) a bill of lading similar to the uniform railroad bills of lading, but the bills of lading themselves show different points of origin, different shippers, different consignees, different shipments, different destinations, different routes and different freight charges.

All this comes about from the manner in which the shipments are tendered by the respondent to the rail carriers. The individual package is not tendered to the railroad for transportation pursuant to the terms of the forwarder's bill of lading. If it were the rail carriers could not accept the same because they cannot under the Interstate Commerce Act be parties to the through rates and routes provided for in a forwarder's tariffs (*Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Supp. 968, at 973; aff. 309 U. S. 638).

It seems clear that the respondent cannot on the one hand, as shipper, tender carload shipments to the railroad for transportation pursuant to the uniform railroad bill of lading and thereby secure the benefit of the carload rates,

and on the other hand claim, at a later date, that the component parts of the carload shipments were moving under bills of lading previously issued by respondent and that the railroads are bound by the terms thereof.

POINT III

The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" of respondent and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.

The *Ward* case (244 U. S. 383) is the leading case of a shipment delivered to a rail carrier by a shipper for transportation on a through uniform railroad bill of lading to a point on the line of another rail carrier. In that case the second rail carrier, although bound to receive the shipment as a connecting carrier, at the rate and upon the terms named in the original bill of lading issued to the shipper a new and second bill of lading covering the identical shipment.

Such is not the way in which forwarders and rail carriers do business with each other. In fact they cannot legally do business that way. The forwarder's tariff, filed pursuant to the provisions of Part IV, provides rates for the transportation of individual packages received by it from the point at which they are received from its shipper, for delivery to that shipper's consignee at final destination. The railroad cannot be a party to this rate, nor is it asked to be. The rail carrier does not issue to the forwarders' shipper a new uniform railroad bill of lading for the transportation of the single package shipment previously delivered to the forwarder and rarely does the forwarder's shipper know by what form of transportation his package is carried to his consignee at final destination. On the con-

trary, upon request of the forwarder, the rail carrier issues to the forwarder, not to the forwarder's shipper, a uniform railroad bill of lading for an entirely different shipment, a carload shipment, which the forwarder as shipper, not as receiving carrier, tenders to the railroad, in which uniform railroad bill of lading the railroad agrees to transport to a rail destination and there to deliver, not to the consignee named in the forwarder's bill of lading, but to the forwarder itself (R. 24, 25). The railroads do not even know who the shippers or consignees of the individual package shipments are, nor do they know the description of the contents thereof (R. 62).

The factual distinctions between the *Ward* and similar cases and the case of a forwarder vis-a-vis the rail carriers in connection with forwarder shipments are many. Among the most important are the following:

1. In the *Ward* case the shipment received by the initial carrier was the identical shipment tendered to and received by the connecting rail carrier. In the case of forwarder traffic the shipment tendered to the forwarder is a less-than-carload shipment and the shipment tendered to the rail carrier by the forwarder is a consolidation of many package shipments (R. 3).

2. In the *Ward* case the connecting rail carrier's uniform railroad bill of lading was issued to the shipper. In the case of forwarder traffic the rail carrier's uniform railroad bill of lading is issued to the forwarder and not to any of the forwarder's individual package shippers (R. 11).

3. In the *Ward* case the initial rail carrier charged the shipper a through rate which was paid by the shipper as agreed. This being a through rate the connecting carrier was held bound to transport the shipment "at the rate" named in the original uniform railroad bill of lading. In the case of forwarder traffic rail carriers are not bound to

transport the shipment upon the forwarder's through rate provided for in the forwarder's tariffs to which the rail carriers are not parties (R. 12). It would be illegal for rail carriers to do so. Rail carriers are bound to transport the carload shipments tendered to them by the forwarders at the carload rates provided for in their own tariffs. Should the rail carrier charge the original rate named in the individual package shipper's bill of lading there could be no profit in the forwarder business or financial justification for the forwarder's existence. The lower carload rate provides the new consideration for the issuance of the uniform railroad bill of lading (R. 13). The fact that there was no new consideration led to the decision in the *Ward* case.

4. In the *Ward* case the shipment was tendered to the connecting carrier for transportation to destination on the same route provided for in the uniform railroad bill of lading issued by the initial carrier. In connection with forwarder traffic there is no rail route specified in the forwarder's bill of lading issued to the individual package shipper. The shipper's route is via Acme, respondent may route the shipment over a motor truck line, a rail line or a combination of the two (R. 9, 10).

5. In the *Ward* case the destination of the uniform railroad bill of lading issued by the initial carrier and the destination in the uniform railroad bill of lading attempted to be issued by the connecting carrier was the same. In forwarder traffic the destination of the forwarder's bills issued to its package shippers are many and varied whereas there is a different destination in the uniform railroad bill of lading issued by the rail carrier to the forwarder (R. 10, 11).

6. In the *Ward* case the uniform railroad bill of lading issued by the initial carrier and the bill of lading attempted to be issued provide for delivery to the same consignee. In the case of forwarder traffic the consignees in the bills

of lading issued by the forwarder to its package shippers are many and different. In the case of the uniform railroad bill of lading issued to the forwarder as shipper, the shipment is consigned to the forwarder (R. 11).

7. In the *Ward* case the shipment was made on a through rate participated in by rail carriers. In the case of forwarder traffic the rail carriers in no way participated in the charges of the forwarder made to its individual package shipper (R. 13, 14).

In the face of these undisputed facts respondent asks that the actualities of the situation be disregarded and that the doctrine of the *Ward* case be applied to a situation to which it clearly was not intended to apply.

The District Court rejected this contention and was at pains to point out the inapplicability of the *Ward* case (R. 83, 84).

In reversing the District Court, the Court below seemed to feel that it was necessary that the doctrine of the *Ward* case be applied in order to give the forwarder a right of subrogation against the rail carrier. Otherwise, said the Court, Congress might be held to have imposed an insurer's liability upon the forwarder, without corresponding right of recourse against the rail carrier (R. 104). In this the Court was in error.

POINT IV

Respondent, a shipper as to the rail carriers, has no right-over against rail carriers under Section 20(11) as incorporated into Section 1013 of Part IV. Were respondent an "initial carrier" as to the railroads any claimed right-over under Section 20(12) is regulated, modified and limited by agreement *i. e.*, Section 2(b) of the uniform railroad bill of lading issued to respondent.

Respondent, by consolidating numerous small package shipments and shipping them in its own name as a carload lot gets the benefit of the low carload rates provided for in the tariffs of the rail carrier (R. 27). Were each of the individual shipments shipped at the rail carrier's less-than-carload rates, respondent could not do business at all, much less do business at a profit.

Can it be that respondent can secure, for its own account, the benefit of these low carload freight charges and, at the same time, repudiate the uniform railroad bill of lading contract incorporated in the classification and hitherto held to be an integral part of the rate structure of rail carriers regulated under Part I of the Act?

It is submitted, as a separate and independent argument that, even if the uniform railroad bill of lading be held to be void as to the forwarder's shipper, and even if the forwarder be held to be the initial or receiving carrier, nevertheless, the uniform railroad bill of lading can still be held valid and binding upon the forwarder as a contract between the forwarder, as initial or receiving carrier (or transportation company) and its "connecting" rail carriers.

As such a contract it can validly operate to regulate, limit or modify any right of subrogation or of recourse

found to have been vested in the forwarder under Section 1013. In other words, treating the forwarder as a carrier, there is nothing in the statute or common law, to prevent one carrier from making a contract with other carriers regulating and modifying their liability, *inter sese*.

The first part of the Carmack Amendment (Section 20 (11)) contains a familiar provision prohibiting the carrier from limiting its liability by receipt or bill of lading issued to the shipper. But the second part of that amendment (Section 20(12)), which gives the initial carrier a right of recourse against subsequent carriers, contains no such provision.

It is established in the law that a party having a right by statute may waive, limit or modify that right. As stated by Judge Ray in *Westinghouse Electric & Mfg. Co.* v. *Binghamton Railway Co.*, D. C. N. Y. 1919, 255 Fed. 378:

> "* * * There can be no valid and binding agreement to violate a law, but private legal obligations imposed by statute may be varied by an agreement which is not forbidden by law, or which is not in violation of or contrary to the public policy and spirit of the law."

Railroad carriers subject to Part I have for many years limited and modified the right-over provided by Section 20(12) by promulgating a set of rules for the settlement, prorating and reimbursement for claim payments made by the initial or delivering carrier pursuant to Section 20(11). These rules are commonly known as Freight Claim Rules and are on file with the Interstate Commerce Commission. Such rules are essential to make Section 20(12) workable in practice. Without them there would be chaos in adjustment of freight claim loss and damage. These Rules in some instances go far beyond the liabilities of railroad carriers *inter sese* under Section 20(12). For instance,

concealed damage and loss, and damage unlocated as to a particular railroad, where there are several participating in a movement, is proratable over all the carriers; but under Section 20(12) the railroad making the payment could only recover from the railroad responsible a well-nigh impossible task.

The existence for many years of the Freight Claim Rules is thus evidence that the right-over under (Section 20(12)) can be modified, as between themselves, by the initial and other rail carriers. (See footnote, p. 18, *supra*.) This respondent is not a party to such rules, but if it has a right-over, a right of subrogation, such right is none the less modified by another contract between respondent and the rail carriers. That other contract is the uniform railroad bill of lading issued by the first rail "connecting" carrier to respondent-forwarder, assumed to be the "receiving" carrier. The consideration for the contract is the carload rate which the forwarder pays the rail carrier, and the further consideration of a further reduced rate applicable to shipments subject to the terms of such contract (R. 35).

It is submitted that this uniform railroad bill of lading contract can and should be given effect as a contract between the forwarder as receiving carrier, or receiving transporation company, and the rail "connecting" carriers, and the result is to regulate and modify the statutory right of recourse or subrogation claimed to be granted the forwarder under Section 20(12) as incorporated into Part IV by Section 1013.

That contract contains a claim clause and the forwarder must comply with such clause before it can exercise any rights of recourse or of subrogation against the rail carrier.

The foregoing contention is the subject of a separate and independent defense, by way of confession and avoid-

ance, set up in petitioners' answers (R. 16, 30). The District Court, having found in favor of petitioners on the points previously discussed, did not pass on this contention. The Court below, however, in the last paragraph of its opinion (R. 105), rejected it.

It is difficult to comprehend the decision of the Court below on this point. Petitioners suggest that that Court erred in holding that the uniform railroad bill of lading, even if invalid as to the forwarder's shipper, could be treated as a contract between the forwarder and its "connecting" rail carriers. Certainly the Court did not appreciate this point when it suggested, in the last sentence of its opinion, that notice by the forwarder's shipper to the forwarder under the forwarder's bill of lading would be compliance by the forwarder with the requirement of notice contained in a different bill of lading contract between the forwarder and the rail carrier.

If, therefore, respondent be deemed an initial carrier and the rail carriers be deemed its "connecting" carriers, respondent's statutory rights against the rail carriers have been regulated by the uniform railroad bill of lading, accepted by respondent for a good consideration; and the respondent must comply with the claim clause contained therein.

CONCLUSION

Because there must be issued to respondent by petitioners, on each carload shipment of forwarder freight traffic, a uniform railroad bill of lading, respondent is bound by the terms and provisions thereof either (1) as shipper of a carload lot, or (2) as a contractor who has agreed, for a valuable consideration, namely the reduced carload freight rate, to the regulation, limitation and modification of any right-over under Section 20(12), and because the nine months notice of claim requirement is one of the terms and provisions of such uniform railroad bill of lading, the judgment and order of the court below should be reversed and judgment be ordered dismissing the complaint against petitioners.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 832

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

MEMORANDUM ON BEHALF OF PLAINTIFF-RESPONDENT

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INDEX

	PAGE
QUESTION PRESENTED	1
STATUTES INVOLVED	2
ARGUMENT	4

Table of Cases Cited

Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174, 177, 185 6

Bare *v.* American Forwarding Co., 146 Ill. App. 388, aff. 242 Ill. 298 6

Block *v.* Merchants Dispatch Transportation Co., 86 Tenn. 392; 6 S. W. 881 6

Buckland *v.* Adams Express Co., 97 Mass. 124 6

Cownie Glove Co. *v.* Merchants Dispatch Transportation Co., 130 Iowa 327, 106 N. W. 749 6

Galveston Wharf Co. *v.* Ry. Co., 285 U. S. 639 5

Kettenhoffen *v.* Globe Transfer & Storage Co., 70 Wash. 645, annotated 42 L.R.A. (N. S.) 902 6

Larkin *v.* Public Utility Commission of Ohio, 124 Ohio St. 554, 180 N. E. 54 6

Mexican Light & Power Co. *v.* Texas Mexican Railway Co., 231 U. S. 731 5

Missouri, Kansas & Texas Railway Co. *v.* Ward, 244 U. S. 383 5

Northern Pacific Railroad *v.* Wall, 244 U. S. 87, 92 2

Ohio & M. R. Co. *v.* McCarthy, 96 U. S. 258, 266 6

Read *v.* Spaulding, 18 N. Y. Super. Ct., 395, 404, aff. 30 N. Y. 630 6

Texas & Pacific Ry. *v.* Leatherwood, 250 U. S. 478 5

Statutes, Commentaries, Etc., Cited

	PAGE
Interstate Commerce Act, Part IV, 49 U. S. Code:	
§20 (11) and (12)	3, 7
§1001	1
§1002	3
§1002 (5)	6
§1002 (7)	7
§1008	5
§1013	2, 7
Corpus Juris Secundum, *Carriers* §3(4), 7, 10	6
Elliott on *Railroads*, 3 ed. §2106	6
Hutchinson on *Carriers*, 3 ed. §84	6
House Committee Report to accompany S 210, 77th Congress, 1st Session, #1172	5
92 Congressional Record 1353	6

Supreme Court of the United States

OCTOBER TERM, 1947

No. 382

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

MEMORANDUM ON BEHALF OF PLAINTIFF-RESPONDENT

Question Presented

Respondent, a freight forwarder regulated under Part IV of the Interstate Commerce Act, 49 U. S. Code §1001, *et seq.*, and the petitioner railroads, utilized by respondent in the transportation services it provides, each issue to their shippers, and publish as part of their tariff classifications, the uniform domestic straight bill of lading, providing, as a condition of recovery for freight loss or damage, for the filing of written notice of claim, within nine months, with "the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose lines the loss * * * occurred * * *" (Sec. 2(b), fol. 70).

The decision below is that a shipper's notice to the respondent satisfies this requirement, a result we believe to follow both from the bill of lading itself, read, as it must be (*Northern Pacific Railroad* v. *Wall*, 241 U. S. 87, 92) in conjunction with 49 U. S. Code §1013, which applies the Carmack Amendment to freight forwarders and makes them receiving and delivering transportation company for that purpose, and decisions of this Court construing the Carmack Amendment as making the conditions of the receiving carrier's bill of lading govern the liabilities of all responsible connecting carriers.

The occasion for this suit was declination by the petitioners and other railroads of a number of claims which respondent had been obliged to pay shippers for losses in rail transportation, following the circulation of an opinion rendered to the Freight Claim Division of the Association of American Railroads, concluding that despite the enactment of Part IV of the Interstate Commerce Act, and §10f3 in particular, notice of claim to rail carriers was essential (fols. 172-210), although notice to responsible connecting carriers within nine months is concededly not required or given, in practice, in the interline settlement of subrogation claims between other carriers subject to the Carmack Amendment (fol. 168).

Statutes Involved

§1013 of the Interstate Commerce Act, Part IV, provides in part:

> "The provisions of Section 20(11) and (12) of this title * * * shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder

shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12)."

§20(11) and (12) of the Interstate Commerce Act, together commonly designated as the Carmack and Cummins Amendments to the Hepburn Act, provide in part:

"(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter, receiving property for transportation * * * shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass. * * *

"(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

§1002 of the Interstate Commerce Act, Part IV, definitions, provides in part:

"(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating ship-

ments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

* * * * * * *

"(7) The term 'service subject to this chapter' means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this chapter to perform or provide; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to sections 401-681 of this title are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 303(b)(7a) [motor vehicle transportation incidental to air carriage] of this title is utilized."

Argument

While it is of evident importance to freight forwarders that their recourse against connecting or underlying carriers should be as broad as the liability imposed on them for those carriers' defaults, we believe it unlikely that review of the case by this Court will do more than confirm the conclusion of the Court of Appeals. Further reasons for this conclusion may be mentioned briefly.

1. The established rule is that liability of connecting carriers in transportation subject to the Carmack Amendment is governed by the conditions of the receiving carrier's bill of lading, and that contrary conditions, either in

intermediate bills of lading or arrangements between carriers, are inoperative. The shipper's rights against both the receiving and connecting carriers are perfected by notice to the former, and, since subrogation involves succession to the rights and remedies of the discharged creditor, the receiving carrier's right of subrogation is established by this as well.[1] These propositions not being open to serious dispute, petitioners argue that a statute giving recourse against the "common carrier, *railroad*, or transportation company on whose line the loss * * * shall have been sustained" does not apply to railroads at all, should be revised to mean "another freight forwarder", and that the operation of the statute is confined to the rare instances where two forwarders have joint loading arrangements (Brief, p. 19).

The argument that the enactment of Part IV effected no change in the preexisting relation between regulated carriers and freight forwarders is not only contrary to the express language of this section, but ignores the fact that changes in their rate relationship were authorized as well (49 U. S. Code §1008) and that the House Report enumerated a number of reasons why these changes were considered appropriate. *House Committee Report to accompany S. 210*, 77th Congress, 1st Session, #1172.

2. Petitioners also necessarily argue that freight forwarders are not "carriers" or "common carriers" and the Court of Appeals, by way of dictum, indicated agreement with this. But while early decisions in some jurisdictions differentiated between the liability of a common carrier

1. *Illinois Commercial Texas Railway Co. v. Ward*, 244 U. S. 383; *Texas & Pacific Ry. v. Leatherwood*, 250 U. S. 478; *Galveston Wharf Co. v. Ry. Co.*, 285 U. S. 630; *Mexican Light & Power Co. v. Texas Mexican Railway Co.*, 301 U. S. 732. While stress is placed by petitioners on the novelty of the question here involved, it deals with the reenactment of a familiar and frequently construed statute.

kind of a forwarder who merely arranged for transportation as shipper's agent, as export forwarders do today, decisions both in this Court and in substantially all state courts are that the status and responsibilities of a common carrier are not confined to those owning or operating the means of transportation, but apply to all who undertake or hold themselves out to provide transportation for the public generally. Moreover, the definition of freight forwarders in the statute is itself the definition of a common carrier[2] as was pointed out by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce at the time of the passage of Part IV, on the occasion of a 1946 amendment to the act. 92 *Congressional Record* 1353. We perceive difference only in detail between Part IV, bringing theretofore unregulated freight forwarder common carriers under regulation, and the Hepburn Act, which brought similarly non-operating express company common carriers under regulation.

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2. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 177, 185; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 266.

3. *Rucklind v. Adams Express Co.*, 97 Mass. 124; *Read v. Spaulding*, 18 N. Y. Super. Ct. 395, 404, aff'd 30 N. Y. 630; *Kettenhofen v. Globe Transfer & Storage Co.*, 70 Wash. 845, annotated 42 L.R.A. (N.S.) 902; *Bare v. American Forwarding Co.*, 146 Ill. App. 399, aff. 242 Ill. 208; *Cosmic Glove Co. v. Merchants Dispatch Transportation Co.*, 130 Iowa 327, 329, 106 N.W. 749; *Bloch v. Merchants Dispatch Transportation Co.*, 86 Tenn. 392; 6 S.W. 881; *Larkin v. Public Utility Commission of Ohio*, 124 Ohio St. 554, 180 N.E. 54; Hutchinson on Carriers, 3 ed., §84; Corpus Juris Secundum, Carriers §3(1), 7, 10; 4 Elliott on Railroads, 3 ed. §2106.

"*Express, dispatch and fast freight companies.* Connected with the railroad service are many organizations, sometimes corporations and sometimes individuals, and they are sometimes in reality composed of several railroad companies, that engage in the transportation of goods as 'fast freight lines,' express companies and the like. Such organizations, whether incorporated or not, are often, in a limited sense, railroad carriers, and, in the strict sense, are common carriers. A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment is a common carrier. This has been held the proper view as to express companies, dispatch companies, and fast freight lines. As elsewhere shown express companies, fast freight lines and the like are common carriers in all that the term implies."

4. §1002(5) "The term 'freight forwarder' means *any person who* * * * *holds itself out to the general public to transport or provide transportation of property* * * * *for compensation* * * *."

Moreover "carrier" as used in the bill of lading is not to be construed in the narrow sense of "rail carrier", as petitioners urge, but in the sense that it would be understood by shippers; and the best evidence that shippers consider freight forwarders carriers with whom claims are to be lodged is the many thousands of claims which are annually filed with them. Petitioners' use of the term in connection with freight claim matters is evidenced by the definition in the Freight Claim Rules of the Association of American Railroads, submitted with the opposing affidavits, Rule 3(a):

> "Any common carrier, including railroad, steamship, transfer or other transportation company."

3. In forwarder transportation it is logical that the forwarder, with whom the shipper deals, should be the initial carrier; and there is no possible question of the intention of Congress to make freight forwarders initially responsible for losses in any part of the transportation service provided by them, with exceptions not here material. Neither the language of 1013 nor the obvious purpose of 20(12) permit the supposition that the right of subrogation given by the latter was designed to be narrower than the initial liability imposed by 20(11). Each applies "in the case of service subject to this chapter" which by definition of the statute means "any or all of the services, * * * which any person undertakes to perform *or provide* as a freight forwarder" with the sole exception of air carriage or incidental motor carriage. 49 U. S. Code 1002(7). The sections are obviously *in pari materia*, and it is not open to petitioners to concede respondent the liabilities of the one and deny the corresponding recourse of the other.

4. We believe no useful purpose will be served in here enlarging upon the opinion below so far as it points out (1) that the Carmack Amendment was designed to augment a shipper's remedies rather than shield the carrier primarily responsible for loss, and (2) that the commonlaw liability of a carrier is not the product of privity of contract, but of the law of bailment, misapprehension of which was the expressed basis of Representative Wolverton's difference with the House Committee Report on this point.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Petitioners,

v.

ACME FAST FREIGHT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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INDEX

	PAGE
QUESTION PRESENTED	1
STATUTES INVOLVED	2
BILL OF LADING PROVISION INVOLVED	4
STATEMENT	4
OPINIONS	6
LEGAL AND LEGISLATIVE BACKGROUND OF PART IV	7
SUMMARY OF ARGUMENT AND AUTHORITIES	15
POINT I—A requirement of notice to the receiving or delivering carrier is met by notice to the party denominated by statute receiving and delivering transportation company	18
POINT II—Bill of lading conditions of liability do not apply to subrogation claims against connecting carriers	24
POINT III—The statute gives a forwarder recourse, in terms, against a "railroad * * * on whose lines the loss, damage, or injury shall have been sustained"	28
CONCLUSION	38

Table of Cases Cited

Acme Fast Freight, Inc. Motor Carrier Application, 2 M.C.C. 415, 8 M.C.C. 211	10
Acme Fast Freight, Inc. *v.* United States, 30 Fed. Sup. 968, aff. 309 U. S. 638	10
Atlantic Coast Line *v.* Riverside Mills, 219 U. S. 186, 201	32, 35

PAGE

Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174, 177, 185 ..... 8, 17, 31
Barc *v.* American Forwarding Co., 146 Ill. App. 388 ..... 8, 19
Brownyard *v.* U. P. R. R. Co., 148 I.C.C. 44, 477 37
Buckland *v.* Adams Express Co., 97 Mass. 124 8
W. J. Byrnes & Co., 260 I.C.C. 55, 57, 59 13

Chicago & N. W. Ry. Co. *v.* Whitnack Produce Co., 258 U. S. 369 ..... 17, 34
Chicago Ry. *v.* McCaull-Dinsmore Co., 253 U. S. 97 ..... 18, 37
Cincinnati & Texas Pacific Ry. *v.* Rankin, 241 U. S. 319 ..... 17, 34
Conkey *v.* Milwaukee & St. Paul Railway Co., 31 Wisc. 619 31
Cownie Glove Co. *v.* Merchants Dispatch Transportation Co., 130 Iowa 327, 329 19

Definition of Freight Consolidators, 43 M.C.C. 527, 535 ..... 17, 35

Freight Forwarder Insurance, 260 I.C.C. 375 ..... 17, 35
Freight Forwarding Investigation, 229 I.C.C. 201, 317, per Eastman, Comm. 20

Galveston Wharf Co. *v.* Ry. Co., 285 U. S. 127 ..... 16, 18, 24, 25, 35, 36, 37
Georgia, Florida, and Alabama Ry. Co. *v.* Blish Milling Co., 241 U. S. 190, 198 21
Great Northern Ry. *v.* O'Connor, 232 U. S. 508 ..... 25, 37

Hayes *v.* Ward, 4 Johns. Ch. 123 ..... 16, 25

I.C.C. *v.* Baltimore & Ohio R.R. Co., 225 U. S. 326 27

Johnson *v.* Manhattan Railway Co., 289 U. S. 479 ..... 16, 25
Judson Sheldon Corp., 260 I.C.C. 473, 475, 478 13
Julius Klugman's Sons *v.* Oceanic Steam Navigation Co., 42 Fed. 2d 461, 463 34

Kansas City & M. Ry. Co. *v.* N. Y. C. & H. R. R. Co., 110 Ark. 612, 163 S.W. 171 ..... 17, 32

PAGE

Kettenhofer *v.* Globe Transfer & Storage Co., 90 Wash. 645, annotated 42 L.R.A. (N.S.) 902 8

Keystone Motor Freight Co. *v.* Brannon-Signaigo Cigar Co., 113 Fed. 2d 736 31

McEvoy *v.* Waterbury, 92 Conn. 664 26

Merchants Dispatch Transportation Co. *v.* Bloch Bros., 86 Tenn. 392, 396 19

Merchants Dispatch Transportation Co. *v.* Bolles, 80 Ill. 473, 476 19

Merchants Dispatch & Transportation Co. *v.* Conforth, 3 Colo. 280, 281 19

Merchants Warehouse Co. *v.* U. S., 283 U. S. 501 ..... 18, 37

Mexican Light & Power Co. *v.* Texas Mexican Railway Co., 331 U. S. 731 ..... 16, 17, 18, 25, 34, 35, 36

Missouri, Kansas & Texas Ry. Co. *v.* Ward, 244 U. S. 383 ..... 15, 22, 24

New Jersey Steam Navigation Co. *v.* Merchants Bank, 6 How. 344 ..... 17, 29, 33

New York Central Railroad Co. *v.* The Talisman, 288 U. S. 239 37

Norfolk & Western Ry. Co. *v.* Dixie Tobacco Co., 228 U. S. 593 ..... 18, 35

Northern Pacific Railroad Co. *v.* Wall, 241 U. S. 87 ..... 15, 19, 21

Ohio & M. R. Co. *v.* McCarthy, 96 U. S. 258 8

Palmer *v.* Agwilines, Inc., 42 F.S. 239, affd. 135 Fed. 2d 689 ..... 17, 30

Powers *v.* Munger, 52 Fed. 705 26

Powhatan Steamboat Co. *v.* Appommatox Railroad Co., 24 How. 257 31

Pritchard *v.* Norfolk Southern R. R. Co., 166 N.C. 532 26

Read *v.* Spaulding, 18 N. Y. Super. Ct. 395, 404, aff. 30 N. Y. 630 19

State Tonnage Tax Cases, 79 U. S. 204 ..... 16, 25

Stowers *v.* Wheat, 78 Fed. 2d 25, 30 ..... 16, 25

PAGE

Texas & Pacific Ry. *v.* Leatherwood, 250 U. S. 478 ..... 10, 24
Townsend *v.* Little, 109 U. S. 504 ..... 16, 27

U. S. *v.* Lexington Mill Co., 232 U. S. 399 ..... 16, 29
U. S. Fidelity & Guaranty Co. *v.* Union Bank & Trust Co., 228 Fed. 448, 453 26

Washington Market Co. *v.* Hoffman, 101 U. S. 113 ..... 16, 29
Wight *v.* United States, 167 U. S. 513, 518 ..... 16, 27

Statute Cited

Interstate Commerce Act, 49 U. S. Code:

§20(11) 2, 13, 14, 26, 28, 30
§20(12) 2, 3, 6, 13, 14, 17, 26, 27, 28, 29, 30, 31, 35, 36, 37
§1001 1
§1002 3
§1002(5) 3, 15, 20
§1002(7) 3, 29
§1008 11
§1009 11
§1013 ..... 2, 6, 7, 25, 27, 29, 30

Other Authorities and Miscellaneous

Corpus Juris Secundum, Carriers, §3(4), 7, 10 20

Elliott on Railroads, 3rd, §2046 20

House Report to accompany S 210, #1172, 77th Congress, First Session 9, 10, 11, 33

Hutchinson on Carriers, 3 ed. §§152, 236, 1305, 1312 ..... 17, 20, 33

Roberts, Federal Liabilities of Carriers, 2 ed. §360 9

40 Cong. Record:
9579 31
9580 ..... 17, 31

87 Cong. Record:
8212 13
8214 13
8216 14

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v.

ACME FAST FREIGHT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

Question Presented

Respondent, a freight forwarder regulated under Part IV of the Interstate Commerce Act, 49 U. S. Code §1001 *et seq.*, and the petitioner railroads, utilized by respondent in the transportation service it provides, each issue to their shippers, and publish as part of their tariff classifications, the uniform domestic straight bill of lading, which provides, as a condition of recovery for freight loss or damage, for the filing of written notice of claim with "the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose lines the loss . . . occurred . . ."

Respondent submits, and the Court of Appeals decided, that notice by a shipper or consignee to respondent satisfies this requirement, and that no further notice by respondent to a rail carrier is necessary to establish respondent's right of subrogation given by the Carmack Amendment, made applicable to freight forwarders by §1013 of title 49.

Statutes Involved

§1013 of the Interstate Commerce Act, Part IV, provides in part:

> "The provisions of Section 20(11) and (12) of this title * * * shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12)."

§20(11) and (12) of the Interstate Commerce Act, together commonly designated as the Carmack and Cummins Amendments to the Hepburn Act, provide in part:

> "(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter, receiving property for transportation * * * shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass. * * *

"(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroads or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

§1002 of the Interstate Commerce Act, Part IV, definitions, provides in part:

"(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

* * * * * * *

"(7) The term 'service subject to this chapter' means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this chapter to perform or provide; but such term shall

not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to sections 401 . . . 681 of this title are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 303(b)(7a) [motor vehicle transportation incidental to air carriage] of this title is utilized."

Bill of Lading Provision Involved

Section 2b of the uniform bill of lading provides, in part:

"Sec. 2.(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury of delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that carrier has disallowed the claim or any part or parts thereof specified in the notice. * * *"

Statement

Respondent is a freight forwarder, sometimes denominated a "carloading company", a transportation service consisting of combining numerous less than carload shipments received at its stations or picked up by motor trucks, shipping these as a carload or truckload, and usually providing immediate truck delivery at destination

(R. 3). Respondent as well as petitioners employ and publish as part of their tariff classifications, the uniform domestic bill of lading, with the claim clause quoted above (R. 3, 4). Petitioners are railroads against which respondent has subrogation claims for amounts it has been obliged to pay shippers for freight damaged or destroyed in rail transportation, and in which the sole or principal defense is that no timely notice of claim was given a rail carrier, although timely notice was given by the shipper or consignee to respondent (R. 5).

The practice has been for respondent, after receipt and investigation of a shipper's claim against it, to forward the claim papers to the responsible rail or truck carrier. Since in forwarder transportation delivery to the rail carrier follows closely upon delivery to the forwarder, but some time is necessary after receipt of the shipper's claim to identify the shipment and carrier responsible for loss, and file claim upon it, instances necessarily occur and will continue to occur where the shipper's claim is within nine months of loss, but refiling with the rail carrier is not. In these instances petitioners assert that respondent is without a remedy (R. 4, 5, 48).

It has, however, never been the practice of rail carriers to apply or enforce any requirement of notice of claim in the interline settlement of subrogation claims arising under §20(12) between carriers earlier subject to the act, and it was conceded in the courts below and is conceded here that "the bill of lading conditions are not applicable to such claims" (R. 4, 49).

Subsequent to the enactment of Part IV in 1942, the Association of American Railroads felt called upon to

1 We suppose this to be the point of the statement in petitioner's brief, p. 22, "Section 20(11) * * * brought about the regulation of initial rail carriers—not as between carriers—but in their relations with their shippers."

issue an opinion, written by a General Attorney of the Pennsylvania Railroad, as to the effect of 1013 upon the bill of lading requirement of notice of claim (R. 50 *et seq.*). This opinion concluded that in spite of the enactment of Part IV, and the granting of the subrogation rights of 20(12) to freight forwarders as claim against railroads, the requirement of notice of claim still existed, since otherwise a preference would be accorded freight forwarders as compared with shippers at large.

Respondent, who had approximately sixty claims for loss or damage in rail transportation refused for this reason, accordingly sought a declaratory judgment against six of the rail carriers involved. Judgment was rendered on cross motions made in the action, by respondent to strike the answers and for summary judgment, and by petitioners to dismiss the complaint and for summary judgment. Petitioners' motions were granted in the District Court. This was reversed by the Court of Appeals.

While this appeal properly involves only the granting of petitioners' motion to dismiss (R. 84), we commend the Court's consideration of the entire record in the interests of an early determination of a question we believe to be solely a legal one.

Opinions

The opinion of the late Judge Bright in the District Court held that since no joint rates were permitted between forwarders and railroads, such as were permitted between forwarders and motor carriers, the subrogation provisions of 1013 do not apply to their claims against railroads; that in the enactment of Part IV there was no congressional intent to alter the preexisting status of forwarders as shippers in their relation to railroads; that

any other conclusion would be contrary to rail tariffs, rules and practices; and that since shippers in forwarder transportation had no privity of contract with the railroads they had no claim against them for loss or damage, and hence the freight forwarder became subrogated to nothing on paying for a loss occurring in rail transportation.

The opinion of the Court of Appeals concluded, from the language of the statute and the House Committee report presenting it, that recourse against railroads was intended; that privity of contract was not a condition of the common-law liability of connecting or underlying carriers for losses in their possession, deriving rather from the law of bailment; that §1013, like the Carmack Amendment it incorporated, was not intended to curtail existing rights of shippers against the carrier in whose possession loss occurred; and that at all events, the freight forwarder, designated by the statute receiving and delivering transportation company and required by the statute to issue a through bill of lading, was a receiving or delivering carrier within the meaning of the bill of lading, so that timely notice to the forwarder established the liabilities of all responsible carriers, and the consequent right of subrogation.

Legal and Legislative Background of Part IV

While this action simply involves a reenactment of the Carmack and Cummins amendments, petitioners' argument, both here and in the courts below, has gone so far afield of this that it may be helpful to review the legal and legislative background of Part IV, as well as the particular section chiefly involved.

While early decisions drew a distinction between common carriers and forwarders in the strict sense of the term—freight brokers and others who merely arranged transportation as shipper's agent, as export forwarders do today—it also became early established that the status and responsibilities of a common carrier was not confined to those owning or operating the means of transportation, in whole or in part, but apply to all who undertake or hold themselves out to provide transportation to the public generally.[2] The fact of a contract for transportation overrode express stipulations for liability as forwarder only (*Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258), and the reasons for imposing such liability, as stated in a leading case, were similar to those supporting the Carmack amendment.

Bank of Kentucky v. *Adams Express Co.*, 93 U. S. 174, 184:

> * * * Express companies frequently carry over long routes, at great distances from the places of destination of the property carried, and from the residence of its owners. If in the course of transportation a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of the public conveyance are responsible, and they can obtain redress much more conveniently than distant owners of the property can. * * *

The operation of this rule was, however, largely offset by the upholding of stipulations relieving carriers of

2. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 177, 185; *Buckland v. Adams Express Co.*, 97 Mass. 124; *Rare v. American Forwarding Co.*, 146 Ill. App. 388; *Kettenhotten v. Globe Transfer & Storage Co.*, 90 Wash. 645, annotated 42 L.R.A. (N.S.) 902.

responsibility for losses in the hands of other carriers they employed, or confining responsibility to liability for their own negligence. This unsatisfactory condition was rectified by the Carmack amendment, which as originally enacted applied to all common carrier interstate transportation (*Roberts, Federal Liabilities of Carriers*, 2 ed. §360) but was, by the first Cummins amendment of 1915, limited in application to regulated carriers.

A substantial type of transportation developed in which concerns combined many less carload shipments into carloads, made their own charge to the shipper, and obtained its operating revenue from the differential between the two rates. This was originally principally conducted between larger centers of population, but later attained its greatest growth by including immediate truck delivery to destination, making the service faster, cheaper, and more convenient than rail freight shipments, and rendering a service particularly useful to small and off-line consignees whose volume of shipments or location denied them use of carload shipments or rates. *House Report #1172, 77th Congress, First Session*, page 2.

Regulation of freight forwarders on the pattern of other parts of the Interstate Commerce Act was recommended by the Commission as early as its annual report of 1930. A freight forwarding investigation led to the same conclusion, although a majority of the Commission favored operation of forwarder service by the Railway Express Agency or a similar railroad-owned monopoly. 229 I.C.C. 201, 307. The minority opinion of the late Commissioner Eastman considered that competing freight forwarders, employing or combining rail and truck transportation in the fields in which each was most efficient,

afforded a type and efficiency of service that railroads had not duplicated and could not be expected to; that "The forwarding companies are not shippers in the ordinary sense, and have much the same relation to railroads and other carriers whose services are utilized as have the Railway Express Agency and the Post Office Department" (229 I.C.C. 315); and that "it is plain that the conditions under which they load and consign carloads are very different from those which are encountered by an ordinary carload shipper, and require, in various respects, different treatment by the railroads." 229 I.C.C. 318.

Upon the passage of the Motor Carrier Act of 1935, the question arose of whether forwarders' utilization of motor carriers made them motor carriers within the definition of that act, a question important in regard to their right to maintain their existing arrangements with motor carriers. The Commission, and subsequently the Court, held them not to be motor carriers within the definition of that act. *Acme Fast Freight, Inc. Motor Carrier Application*, 2 M.C.C. 415, 8 M.C.C. 211; *Acme Fast Freight, Inc.* v. *United States*, 30 Fed. Sup. 968, aff. 309 U. S. 638.[3] Since the result of this threatened to curtail their motor delivery or pick-up service practically to rail terminal areas, and disrupt an established and substantial transportation service to off-line points, it was a considerable factor in the passage of Part IV. *House Report to accompany S210, #1122, 77th Congress, First Session*, pp. 2-3.

Part IV, enacted May 16, 1942, applied to freight forwarders the same type of regulation theretofore applied

3. Compare petitioners' brief, p. 8 "In that case * * * it was held that respondent was not a common carrier" with the District Court's opinion, p. 973:

"While the four forwarding companies are doubtless responsible to their customers as common carriers at common-law, we think it clear that none of them is 'a common carrier by motor vehicle' within the meaning of the Motor Carrier Act * * *"

to railroads, pipelines, express companies, motor carriers, and water carriers. Authority was granted by §1008 for other regulated carriers to establish special assembling and distribution rates or charges, to be available to freight forwarders and others employing such carriers under like conditions. Subsequently, by amendment to §1009 of February 20, 1946, continuation of joint rates with motor carriers was authorized, pending study and determination by the Commission of equitable arrangements with them.

In connection with petitioners' argument that no change in the relation of freight forwarders with other regulated carriers was contemplated, we may quote the House report in dealing with §1008.

Report to accompany S 210, #1172, supra, page 12:

> "The decision of the committee not to include permanent authority for joint rates between forwarders and carriers subject to parts I, II, and III was not based on the belief that freight forwarders should be required to pay full published rates to such carriers in all cases. On the contrary, the committee is of the opinion that there is ample justification for rates available to forwarders (and to others who utilize the services of carriers under like conditions), lower than the rates available to shippers generally, on account of the special conditions under which forwarders and certain other persons utilize the services of carriers in assembling and distributing operations.
>
> * * *
>
> "Among the circumstances and conditions under which carriers perform service for freight forwarders, and which warrant the establishment by such carriers of the rates authorized by this section, are the following:

"(1) Solicitation expense to the carriers is virtually eliminated in the case of service they perform in connection with assembling and distributing operations of freight forwarders.

"(2) The clerical and detail work of the carrier (billing, accounting, rating, classifying, etc.) is substantially reduced in the case of such traffic. This is due partly to nature of the traffic and partly to the service performed directly by the forwarder.

"(3) The carrier's work in handling and investigating claims for loss or damage or overcharge is greatly reduced, due to the forwarder's responsibility to the shipper for the entire through movement.

"(4) The carrier receiving property from individual shippers, for transportation to a concentration point, is saved time and expense by reason of not having to make delivery of the separate shipments to individual consignees. Likewise, carriers who perform service for forwarders beyond the break-bulk point are saved time and expense, due to receiving at a single stop shipments destined to various individual consignees.

"(5) Forwarder traffic provides tonnage for short-line carriers, which would not otherwise be available to such carriers, in the case of shipments originating at, or destined to, distant points.

"(6) A forwarder moves traffic in regular established channels, in fairly predictable volume, thus enabling the carriers whose services are utilized to allocate equipment in advance, and to depend on a more or less steady flow of traffic."

From the date of the first Cummins amendment in 1915 to the enactment of Part IV, freight forwarders, as

common carriers not subject to the act, were at liberty to confine their responsibility to loss caused by their own negligence, escaping liability for losses in the hands of underlying rail or truck carriers, and some of them made this their practice. *Judson Sheldon Corp.*, 260 I.C.C. 473, 475, 478; *W. J. Byrnes & Co.*, 260 I.C.C. 55, 57, 59. When this comprehensive regulation of freight forwarders was undertaken, the extension of the Carmack amendment to them was considered, and in the circumstances of their operations it was considered logical that they, who dealt with the shipper, should issue the through bill of lading evidencing the shipment and that they should be responsible to the owner for the whole of the transportation service provided by them. A proposal was made and rejected in committee that they be relieved of liability for loss between their terminals.[4] Since in forwarder transportation the actual carriage is in the hands of rail or motor carriers, and loss or damage usually occurs while the freight is in their possession, it was equally logical to give forwarders a right of subrogation measured by the amount they were obliged to pay in discharge of such liabilities, against the primarily responsible carrier, and the House Committee report stated that this was intended:

> *House Report 1172, supra*, p. 15.
>
> "Section 413, *Bills of Lading and Delivery of Property.*
>
> "This section makes the provisions of section 20(11) and (12) of the Interstate Commerce Act applicable with respect to freight forwarders. The

4 87 Cong. Rec. 8214 "Mr. [Chairman] Lea * * * The Cummins amendment requires that the initial carrier should assume that responsibility [of issuing bills of lading] and that liability is up here against the forwarder."

5 87 Cong. Rec. 8212 "Mr. [Chairman] Lea * * * One demand was that a freight forwarder be relieved from responsibilities as the initial carrier to the shipper of the freight from the time he receives it until it reaches the other end. The shippers of the country would never be willing to have that change in the policy of the present law, put in there for their benefit."

effect of this will be to require freight forwarders to give their customers a bill of lading covering the service performed by the freight forwarder, under which the freight forwarder will assume liability for the movement of the property from point of origin to point of destination. The freight forwarder will be considered both the receiving and delivering transportation company, for purposes of section 20(11) and (12) but in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight forwarder utilizes, the freight forwarder will have the right to subrogation against the carrier under section 20(12)."

There was not, however, unanimity in this view of the section, for Representative Wolverton, ranking minority member of the House Committee, in commenting on the act after its introduction by Chairman Lea, stated (87 Cong. Rec. 8216):

"In its explanation of section 413, the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of Part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, *the latter is the only person to which such shipper is entitled to look for recovery of damages*, and it is in this sense that the forwarder is to be deemed both the receiving and delivering transportation company. *If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right of subrogation under section 20(12), since its own shipper never had any right of action against such carrier.* The forwarder's recovery against the carrier would be upon the bill of lading issued to

it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved."

We have italicised the reason assigned for this different view of the statute's operation, as it will be examined at a later point in the brief.

Summary of Argument and Authorities

I. The requirement of notice to the receiving or delivering carrier is met by notice to the party denominated by statute receiving and delivering transportation company. The bill of lading should be interpreted in the light of the statute.

Northern Pacific Railroad Co. v. Wall, 241 U. S. 87.

The definition of freight forwarder in the statute is the definition of a common carrier.

49 U. S. Code, 1002(5).

The legitimate objects of notice of claim are met by notice to a freight forwarder, and the consequences of their liability for loss are the same as any other carrier subject to the act.

II. Bill of lading conditions of liability do not apply to subrogation claims against connecting carriers.

In transportation subject to the Carmack Amendment the initial carrier's bill of lading is the only one operative as to conditions of liability.

Missouri, Kansas & Texas Ry. Co. v. Ward, 244 U. S. 383;

Texas & Pacific Ry. v. Leatherwood, 250 U. S. 478;
Galveston Wharf Co. v. Ry. Co., 285 U. S. 127;
Mexican Light & Power Co. v. Texas Mexican Railway Co., 331 U. S. 731.

This construction attaches to a reenactment of the statute, especially one directed to apply "with the same force and effect" as the original act.

State Tonnage Tax Cases, 79 U. S. 204;
Johnson v. Manhattan Railway Co., 289 U. S. 479.

Subrogation involves succession to the rights of the discharged creditor, in this instance the owner of the shipment.

Hages v. Ward, 4 Johns. Ch. 123;
Stowers v. Wheat, 78 Fed. 2d 25, 30.

A remedy provided by specific statute is not an unreasonable preference.

Townsend v. Little, 109 U. S. 504;
Wight v. United States, 167 U. S. 512, 518.

III. The statute gives a forwarder recourse, in terms, against a "railroad * * * on whose line the loss, damage, or injury shall have been sustained."

Limiting the statute's application to recourse against other freight forwarders goes beyond the permitted bounds of construction.

Washington Market Co. v. Hoffman, 101 U. S. 113;
U. S. v. Lexington Mill Co., 232 U. S. 399.

"Service subject to this chapter" is defined as all the service "performed or provided by a freight forwarder", with the exception of air carriage, and it applies equally to the liability and the subrogation provisions of the act. The instance of connecting carriers is an established case for subrogation, and complete recourse was contemplated by §20(12).

Palmer v. *Aquilines, Inc.*, 42 F. S. 239; affd. 135 Fed. 2d 689;
Bank of Kentucky v. *Adams Express Co.*, 93 U. S. 174, 184;
40 *Cong. Rec.* 9580;
Kansas City & M. Ry. Co. v. *N. Y. C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

Recovery against a carrier in whose possession a loss occurs is not dependent on privity of contract.

New Jersey Steam Navigation Co. v. *Merchants Bank*, 6 How. 344;
Hutchinson on *Carriers*, 3 ed. §§152, 236, 1305, 1312.

The remedy against connecting carriers was not curtailed by the Carmack Amendment.

Chicago & N. W. Ry. Co. v. *Whitnack Produce Co.*, 258 U. S. 369;
Cincinnati & Texas Pacific Ry. v. *Rankin*, 241 U. S. 319;
Mexican Light & Power Co. v. *Texas Mexican Railway Co.*, 351 U. S. 734;
Definition of Freight Consolidators, 43 M.C.C. 527, 535;
Freight Forwarder Insurance, 260 I.C.C. 275.

Through or joint rates have no bearing on carrier responsibility:

Norfolk & Western Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593;
Galveston Wharf Co. v. Ry. Co., 285 U. S. 127;
Mexican Light & Power Co. v. Texas Mexican Railway Co., 331 U. S. 731.

Railroad rules, tariffs, or practices cannot defeat the application of statute to them.

Merchants Warehouse Co. v. U. S., 283 U. S. 501;
Chicago Ry. v. McCaull-Dinsmore Co., 253 U. S. 97.

POINT I

A requirement of notice to the receiving or delivering carrier is met by notice to the party denominated by statute receiving and delivering transportation company.

The terms of the bill of lading permit effectual notice to be given any of the parties who may be held liable for the loss, who thus have an interest in ascertaining the facts, or to whom the shipper will naturally turn for redress. The receiving and delivering carriers are the persons with whom shipper and consignee deal, and liable under the Carmack Amendment; the carrier issuing the bill of lading is the party whose receipt the shipper holds, and the carrier on whose lines or in whose possession the loss occurs is liable *quasi ex delicto* at common law. The Carmack Amendment having long antedated the drafting of this bill of lading, the "receiving or delivering carrier"

described in it is plainly the receiving or delivering common carrier, railroad, or transportation company of the statute. "This bill of lading was issued under that statute and should be interpreted in the light of it." *Northern Pacific Railroad Co.* v. *Wall*, 241 U. S. 87, 97. The statute having placed initial liability on the freight forwarder, and obliging it to issue the through bill of lading, the bill of lading description applies to it.

While it is doubtless a matter in the realm of semantics only whether respondent is called a common carrier, or a transportation company with all the attributes of a common carrier, it may be pointed out that neither the decided cases nor authoritative texts distinguish the two. No distinction is drawn by the Carmack Amendment between carriers who operate the physical means of transportation and those who contract for transportation, but employ the vehicles of others, for express companies have been subject to it since its enactment, and as originally enacted it applied to all interstate common carrier transportation. Neither is there a distinction in the definition of common carriers at common-law between express companies, operating principally in passenger train service, and dispatch or fast freight companies, such as the former Merchants Dispatch Transportation Company, operating in rail freight service over the lines of various roads.[7] On the contrary, when we recall the strictures at that time laid on legislation affecting the contracts of private carriers,

[7] *Read* v. *Spaniding*, 18 N. Y. Super. Ct. 395, 401, aff. 30 N. Y. 630; *Lyons Glove Co.* v. *Merchants Dispatch Transportation Co.*, 130 Iowa 327, 328 ("The evidence also sufficiently showed that the defendant was a common carrier"); *Merchants Dispatch Transportation Co.* v. *Bloch Bros.*, 86 Tenn. 302, 306 ("In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed"); *Merchants Dispatch & Transportation Co.* v. *Comforth*, 3 Colo. 280, 281 ("The Merchants Dispatch & Transportation Company is a common carrier"); *Merchants Dispatch Transportation Co.* v. *Keller*, 80 Ill. 473, 476 ("When defendant received the goods at Worcester its liability was that of a common carrier"); *Bare* v. *American Forwarding Co.*, 136 Ill. App. 388, 391 ("The defendant held itself out as ready

or business not affected with a public interest, it is most unlikely that the Hepburn Amendment was concerned with anything but common carrier transportation companies, and the disjunctive "common carrier, railroad, or transportation company" no more shows the contrary than it shows railroads not to be common carriers. The difference between express companies, regulated carriers since 1906, and freight forwarders is slight (*Freight Forwarding Investigation*, 229 I.C.C. 201, 317, per Eastman, Comm.); and difference only in detail is to be perceived between the statutes regulating each.

Petitioners make much of the fact that the word "carrier" was intentionally avoided in the drafting of this legislation. However, the definition of freight forwarder in the statute is itself the definition of a common carrier.

§1002(5). The term "freight forwarder" means *any person which * * * holds itself out to the general public to transport or provide transportation of property * * * for compensation* * * *." "Carrier" as used in the bill of lading is not to be construed in the limited sense of "rail carrier", but in the sense that it would be understood by shippers, and the best evidence of their

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to carry for every one and was therefore a common carrier"); *Corpus Juris Secundum, Carriers*, § 3(4), 7, 10

2 Cf. Elliott on *Railroads*, 3d, § 2016

"A transportation company not owning or controlling any means of conveyance itself but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its selection and employment is a common carrier. This has been held the proper view as to express companies, dispatch companies, and fast freight lines. As elsewhere shown, express companies, fast freight lines and the like are common carriers in all that the term implies."

Hutchinson on *Carriers*, 3 ed., § 84:

"Other carriers, under the names of dispatch companies, fast freight lines, and the like, have also come into existence, which conduct their business upon the same principles as express companies, that is by the employment of the means of transportation furnished them by others, and to which, for the same reasons, the same rigid rule of responsibility as to common carriers is applied."

understanding of the matter of this many thousands of claims annually filed with freight forwarders. They have a forwarder's bill of lading, they have been schooled to understand that the issuer is a proper party to file claim upon. Petitioners' own official construction of carrier is no more technical. A.A.R. Freight Claim Rule 30(a), submitted with opposing affidavits, defines carrier:

> "Any common carrier, including railroad, steamship, transfer or other transportation company."

Notice of claim provisions are no especial favorite of the law, as the nine months provided is the minimum the Carmack amendment allows, and the construction put upon the requirement has not been as unduly technical as the defendants would have it. So far as the form of notice is concerned, the Court has observed that "It is addressed to a practical exigency and is to be construed in a practical way." *Georgia, Florida, and Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 198. In the leading case of *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87, a requirement of notice of loss to a receiving carrier was held to be satisfied by notice to the delivering carrier, the court stating, page 92:

> "In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose and gives due effect to the statute under which it was issued."

By the terms of the bill of lading, filed on file one of the responsible carriers preserves the shipper's rights against all; the legitimate object of the provision, of setting investigation of the claim in motion, is accomplished. There is as a practical matter no reason why notice to a freight forwarder is less effectual to start the process of investigation than an initial rail, water, or express carrier; in any case the initial responsibility to the shipper affords equal impetus to develop the facts and identify responsibility at the earliest date. From the standpoint of the shipper, in whose interests the Carmack amendment was mainly concerned, any other rule would be a backward step. It is even less reasonable in forwarder transportation than all rail, for example, to require, as a condition of the shipper's recourse against other responsible carriers, that he identify them and give notice to them as well as the agency with whom he deals. "If, as contended, a shipper must, in order to recover, first file his 'verified claim' with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still be under the burden of determining which of the successive carriers was at fault. Such a construction of the Carmack amendment would defeat its purpose, which was to relieve shippers of the difficult and often impossible task of determining on which of the several connecting lines the damage occurred." *Missouri, Kansas & Texas Ry. v. Harriman*, 227 U. S. 657, 672; *Chicago, Rock Island & Pacific Ry. v. Ward*, 244 U. S. 383, 387.

It is further to be observed that whatever the differences between freight forwarders and other regulated carriers in the physical conduct of their transportation services, there is no difference whatever in the practical consequences of their loss and damage liability. This has

to do, not with transportation, but with claim adjustment and litigation. The receipt of claims, the investigation of occurrence of the loss or damage, verification of the amount of loss, the obtaining of supporting papers, and not infrequently the burden of initial litigation of contested claims are borne in the first instance by the freight forwarder as by any other receiving carrier. And, of cardinal importance in the practical situation presented in this case, since the physical carriage of its freight is in the hands of its connecting or underlying carriers, the freight forwarder must usually rely on receipt of a claim from the shipper or consignee before it is in a position to know the full nature or value of the contents of the shipment or the amount of damage involved, and frequently whether there has been any loss or damage and hence whether there will be a claim against the underlying carrier. This is true, for example, of concealed damage, the occurrence of which is not known until the parcel is unpacked by the consignee. This is an entirely different position than a consignee receiving a damaged shipment, and a position in all respects similar to that of any other receiving or delivering transportation company. The fact that the connecting carriers are, in forwarder transportation, spared considerable work and expense by this screening of claims is one of the reasons given by the House Committee Report (*supra*, pp. 11-12) for differentiating between freight forwarders and shippers generally. There are differences that can be pointed out between Part IV and other parts of the act, but the relation toward shippers and toward the underlying carriers in regard to loss and damage liability are so far identical that Congress considered it appropriate to apply the Carmack and Cummins amendments in their entirety to freight forwarders.

POINT II

Bill of lading conditions of liability do not apply to subrogation claims against connecting carriers.

If we are correct in supposing that the uniform bill of lading, construed in the light of this legislation, refers to the carrier initially liable and required by statute to issue the through bill of lading, the case presents no further question. The bill of lading does not specify presentation of claims to a *rail* carrier. But even if this were not clear, it is established by the rule that there is only one operative bill of lading in transportation subject to this act.

It has long been settled that the conditions of liability of the receiving carrier's bill of lading—the bill of lading the statute requires—govern the liabilities of all responsible carriers, and that contrary conditions, whether in intermediate bills of lading issued the shipper, or arrangements between carriers, are inoperative, since the purpose of the Carmack Amendment was "to create in the initial carrier unity of responsibility for the transportation to destination." *Missouri, Kansas & Texas R. Co.* v. *Ward*, 244 U. S. 383, 386; *Texas & Pacific Ry.* v. *Leatherwood*, 250 U. S. 478; *Galveston Wharf Co.* v. *Ry. Co.*, 285 U. S. 127; *Mexican Light & Power Co.* v. *Texas Mexican Railway Co.*, 331 U. S. 731. The shipper's right of recovery is thus made uniform and does not depend on the circumstance of which of the responsible carriers he sues. In the *Ward* case recovery was allowed against a connecting carrier whose bill of lading had a notice of loss provision, with which the plaintiff had not complied, since the initial carrier's bill of lading had contained none; in the *Leatherwood* case, conversely, the connecting carrier was protected by a sixty day limit on suit in the initial carrier's bill of lading which its own did not contain; while in the

Galveston Wharf case, a dock and switching carrier was held liable by the terms of the original bill of lading in spite of provisions in its switching tariffs and contract with a line haul carrier that it should only be responsible for negligence on its part, since "the Wharf Company was not entitled to vary the liability, as determined by the terms of the through bill, by its arrangements with the Railway Company" 285 U. S. 127, 136. On familiar principles, this construction attaches to the reenactment of the Carmack Amendment by 1013, particularly a statute directed to apply "with like force and effect" as the incorporated act. *State Tonnage Tax Cases*, 79 U. S. 204; *Johnson v. Manhattan Railway Co.*, 289 U. S. 479. Consequently, a forwarder's shipper is entitled to recovery against the primarily responsible rail or motor carrier to the same extent that the forwarder is liable, rather than limited, as formerly (*Great Northern Ry. v. O'Connor*, 232 U. S. 508) by the forwarder's arrangements with them. Under these decisions it is clear that respondent might sue and recover as assignee of the shipper, and that lack of notice to connecting or underlying carriers would afford no defense. A statutory right of subrogation would hardly be less than this, since subrogation ordinarily involves succession in full measure to the rights and all remedies of the discharged creditor, as is expressly stated in the A.A.R. opinion. *Hayes v. Ward*, 4 Johns. Ch. 123; *Stanley v. Wheat*, 78 Fed. 2d 25, 30.

This is, moreover, the construction put upon the section by the petitioner's themselves over a period of many years. In the interline settlement of subrogation claims between rail carriers no notice of claim, within nine months or any other period, is made a prerequisite of liability, as is shown by the complaint, the moving papers, and the Freight Claim Rules of the Association of American Railroads, submitted with the opposing affidavits. It thus

follows, and has been conceded by petitioners, that the bill of lading conditions of notice do not apply to subrogation claims under 20(12). It is consequently true of freight forwarders' claims as well, unless, contrary to the express language of this section, it does not apply to their claims against railroads at all. Respondent's position is merely that if it is granted the same unqualified right of indemnity that is considered the due of other carriers made vicariously responsible by the same statute.

Petitioners profess to believe that treatment of forwarders' subrogation claims on the same basis as other carriers' subrogation claims against them under §20(12) would constitute a preference, and even a Court of Appeals decision has apparently not freed them from the apprehension of guilt that only they have charged. It would, on the contrary, be a discrimination against freight forwarders if petitioners succeeded in applying strictures to forwarders' claims for reimbursement that they do not apply to other regulated carriers similarly rendered responsible for their torts. The distinction between original claims of shippers and subrogation claims of carriers is not only one that the statute creates and the railroads themselves apply, but there are evident grounds for doing so. A subrogation claim does not accrue at the time of loss; it is contingent unless and until the creditor is paid, and on the analogous question of limitations is usually so treated. *Powers* v. *Munger*, 52 Fed. 705; *Pritchard* v. *Norfolk Southern R. R. Co.*, 166 N. C. 532; *McEvoy* v. *Waterbury*, 92 Conn. 664; *U. S. Fidelity & Guaranty Co.* v. *Union Bank & Trust Co.*, 228 Fed. 448, 453. The measure of damages under this section, as with subrogation claims generally, is not the value of the shipment but the amount the initial carrier has paid in satisfaction of the claim. Different provisions of the act deal with them. Section 20(11) deals with shippers' original claims, 20(12) with subrogation claims. The petitioners' argument is that it

is a preference if they do not, as regards freight forwarders, confuse the two, but differentiate between §20(12) claims of rail or regulated carriers other than freight forwarders, and §20(12) claims of freight forwarders.

§1013 is as much an act of Congress as the provisions generally prohibiting unreasonable preferences, and is specific. If any conflict is perceived between the specific provisions of this section and the general terms of the other, the specific controls. *Townsend* v. *Little*, 109 U. S. 504, 512. Unless it was beyond the competence of Congress to regulate freight forwarders as common carriers, and so differentiate between them and the shipping public, Congress has done so, both generally and in particular with respect to responsibility for loss and damage. Mere differentiations are not enough to constitute an unlawful preference, even one not thus specifically provided by statute. Transportation is full of differentiations of all sorts, but to be unlawful they must as well be unreasonable. Inequality in treatment to constitute a preference must differentiate between shipments "under the same circumstances of carriage." *Wight* v. *United States*, 167 U. S. 512, 518. The circumstances of carriage for a regulated transportation agency are plainly different than for shippers.

I.C.C. v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, holding that different rates could not be applied between shipments of coal for railroad fuel, and commercial coal, is cited as forbidding differentiation between the subrogation claims of forwarders and the original claims of shippers. This argument proves too much. If subrogation claims against connecting carriers must be treated on the same footing as original claims of shippers, §20(12) is no less a violation of this supposed policy than §1013, and the elaborate structure of defendant's freight claim rules, having no like condition of notice, would be

patently unlawful. Citation of this emphasizes that questions of liability are not to be confused with rate questions, for while ownership of a shipment does not affect the worth of the service involved in its carriage, it is the controlling factor in the right to recover for loss.

It is also suggested that it is discrimination not to apply 20(12) to the claims of unregulated freight consolidators. The sufficient answer is that since they are, at most, private or contract carriers, subject to none of the liabilities and restrictions upon contract of 20(11), nay the common-law liabilities of common carriers, the grant of a right of subrogation to them is unnecessary. The differentiation is the historic one between private and common carriers. Any one who does perform service similar to freight forwarders, *for the general public*, is one, by definition of the act.

POINT III

The statute gives a forwarder recourse, in terms, against a "railroad * * * on whose lines the loss, damage, or injury shall have been sustained."

The principal argument of petitioners is that this legislation was not designed in any way to alter the existing relation between freight forwarders and railroads, and that the scope of operation of this section is confined to the negligible number of instances where two forwarders jointly load a car. This argument, as well as leaving virtually no scope for operation of the statute, thus comes down to the flat proposition that a statute providing:

> "The * * * transportation company issuing such receipt or bill of lading * * * shall be entitled to recover from the common carrier, *railroad* * * *"

is to be construed as

"* * * shall be entitled to recover against another freight forwarder only."

This is redrafting, not construction. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115; *U. S. v. Lexington Mill Co.*, 232 U. S. 399, 410. It contravenes both the language of the statute, and the House Report explanation of it, finding its only support in doubtful inference from other portions of the act not concerned with loss and damage liability, and random comments in Congress. While other portions of the act have no necessary bearing on the question of loss and damage liability, the fact, as expressly and repeatedly stated in Congress, was that a principal urgency for passage of the legislation was to enable rate arrangements with regulated carriers that existing legislation forbade.

Petitioners' illustration of the field of operation of §20(12) is the instance of joint loading, on the hypothesis that the shipper must sue one forwarder, that forwarder sue the other, and the latter sue the rail carrier, before the party primarily liable is brought to book." Brief, p. 31. This supposes a requirement of privity of contract for recovery against a carrier, but the occasion for such enforced circuity of action has not been present for a century. *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 344.

The application of the section to railroads is further confirmed by the language of §1013 "in the case of service subject to this chapter." This is defined (§1002(7)) as "any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform *or provide* as a freight forwarder" with the sole exception of air carriage and motor carriage.

incidental to air carriage. "Service subject to this chapter" applies alike to the incorporated §20(11) and §20(12); if it meant the forwarder's terminal services only, the forwarder would be under no responsibility, under §20(11), for losses occurring in rail or motor carriage, and the evident and expressed purpose of the section would be thwarted. It is not and cannot be questioned that the principal object of the section was to compel forwarder responsibility for losses whether occurring in the possession of the forwarder or of rail or motor carriers they utilize, and the coverage of §20(12) as reenacted can be no narrower. The sections are plainly *in pari materia*, and it is not open to petitioners to concede respondent the liabilities of the one and deny the corresponding recourse of the other.

We believe no process of inference can be compelling enough to transform the words of a statute "common carrier, railroad or transportation company" into "freight forwarder only"; but if genuine ambiguity were present, §1013 is entitled to liberal rather than narrow construction as a remedial act. The liability provisions of §20(11) have always been given such a construction in aid of adequate recourse of shippers, much of which the defendant's arguments would deny to them in the application of §1013. The provisions of §20(12) are no less remedial and practical. Subrogation, a remedy of equity borrowed from the civil law, is of such evident justice that it is usually afforded without express provision to one vicariously liable for the fault of another, and recourse under these circumstances against a connecting carrier is an established case for its operation."

Palmer v. Aquilines, Inc.: 42 Fed. Sup. 239, 242; aff'd 135 Fed. 2d 689 (C.C.A. 2d);

> "The general rule as between connecting carriers at common law is that the one which has been compelled to pay for a loss or injury for which another is primarily liable is entitled to exoneration at the hands of the latter." *Powhatan Steamboat Co. v. Appomattox Railroad Co.*, 24 How. 257; *Conkey v. Milwaukee & St. Paul Railway Co.*, 31 Wisc. 619."
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> *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184;
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> *Keystone Motor Freight Co. v. Brannon-Signaigo Cigar Co.*, 115 Fed. 2d 736.

The purpose of §20(12) was to give complete recourse to the receiving carrier thus made responsible for the torts of another. The language of this section was chosen, according to the Conference Committee reporting it, to make the indemnity as broad as the liability; "so that the liability of the carrier to the shipper and of the subsequent carrier to the original carrier are made the same". 40 *Congressional Record* 9579. The justice of the Carmack Amendment was supported in debate by the very positive expectation that—

> "If a judgment is obtained against an initial carrier, no doubt exists but that the secondary carrier would pay it at once."

40 *Congressional Record* 9580, quoted in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 201. In the latter case the constitutionality of a statute requiring the initial carrier to pay a connecting carrier's debt was sustained in part by the Court's expressed faith that as a practical matter reimbursement was assured. *Ibid.* 204.

The measure of recovery that the statute affords the receiving carrier is no less remedial and practical, in fix-

ing the recovery as the amount paid out on a judgment or settlement of a claim, rather than calling for common law proof of contents and value of a shipment. Freight loss or damage, though amounting to over a hundred million dollars yearly, involves in most instances small amounts, usually less than $250. The measure of damages is seldom a genuine issue, for the great majority are shipments from seller to purchaser, and damages are thus ordinarily readily established by the invoice price plus freight. At the same time the receiving carrier is seldom in control of competent common law evidence of contents or value, and to make its recourse depend on this would as a practical matter be a denial of recourse in many instances. The shipping public benefits by the provision as well, for it facilitates the settlement of claims of apparent merit without litigation and without jeopardising recourse against the party primarily responsible, and unquestionably contributes materially to the comparatively limited volume of freight claim litigation in the courts at the present day. These considerations are as fully applicable to freight forwarders as any other carriers, and to differentiate between them is a distinction without a difference, as well as a contradiction of the express language of the statute.

Kansas City & M. Ry. Co. v. New York Central & H. R. R. Co., 110 Ark. 612, 163 S. W. 171:

> "It was the purpose of the Congress by the Carmack Amendment to the Hepburn Act to make the initial carrier liable for loss caused by it or any connecting carriers, and to give the initial carrier, after it had been required to pay the loss, a remedy over against the particular connecting carrier causing the loss, for the amount paid by the initial carrier as evidenced by 'any receipt', etc.

> The provision was intended to make the remedy of the initial carrier as complete and convenient as possible, and therefore the act provides for the simple, easy, and direct method of establishing the amount of the claim by the receipt showing the payment."

The opinion of the Court of Appeals corrects the serious misconception that was expressed by the District Court and was the basis of Representative Wolverton's disagreement with the House Report on the question of subrogation that right of recovery for loss or damage is founded on privity of contract with a carrier, and that the owner of property damaged or destroyed in the hands of a connecting or underlying carrier has no claim directly against it, so that the receiving carrier becomes subrogated to nothing.

The liability of a common carrier is, of course, based on the common law duty of a carrier of safe custody and delivery, the rule of *Coggs v. Bernard*—a liability analogous in many respects to tort liability; it does not depend on contract and frequently applies irrespective of contract conditions to the contrary; and it is the basis not only of the right of a consignee, under a straight or non-negottable bill of lading, to maintain suit, but of the rule in all jurisdictions that a connecting carrier is liable for losses occurring in its possession. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; Hutchinson, *Carriers*, 3 ed. §§ 452, 236, 1305, 1312. Indeed, except for contractual assumption or statutory imposition of liability for losses in the hands of others, the connecting carrier in whose possession the loss occurred was the only party liable, and it was for this very reason that the Carmack Amendment was enacted.

Neither is it sensible to suppose that Part IV was intended or is operative to curtail the existing alternative remedy of shippers against the carrier primarily responsible for loss. Common-law or established statutory remedies are not abolished or impaired by uncertain implication. There are many circumstances under which this additional recourse may be of value to shippers, such as circumstances of insolvency of one carrier (*Julius Kluge man's Sons* v. *Oceanic Steam Navigation Co.*, 42 Fed. [2d] 461, 463) and it has been repeatedly held that this was not of the effect of the Carmack Amendment, which was to augment rather than curtail a shipper's remedies. "Properly understood neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line." *Cincinnati & Texas Pacific Ry.* v. *Rankin*, 241 U. S. 319, 326. "The suggestion that by imposing additional liability upon the initial carrier the amendment provides an adequate remedy for shippers and therefore removes the necessity for any presumption against the terminal one and impliedly abrogates the rule is unsound. There are adequate reasons why shippers should have the benefit of both, and we think Congress so intended." *Chicago & Northwestern Ry. Co.* v. *Whitnack Produce Co.*, 258 U. S. 369, 374; *Mexican Light & Power Co.* v. *Texas Mexican Ry. Co.*, 231 U. S. 732, 733. We cannot credit an intended departure from this policy either to Representative Wolverton or any other proponents of this legislation, even if the statute had not been directed to apply "with like force and effect as in the case of persons" subject to the incorporated act. This is evidently the view of the Interstate Commerce Commission, which recently had occasion to state "That forwarders assume responsibility for loss and damage does not lessen the

responsibility of underlying carriers." *Definition of Freight Consolidators*, 48 M. C. C. 527, 535), and in explanation of a statement that a freight forwarder in turn has recourse against the "line haul carrier" referred to this section, stating "Section 413 of Part IV makes the provisions of [20(12)] of Part I applicable to freight forwarders." *Freight Forwarder Insurance*, 260 I. C. C. 375, 378. Yet petitioners continue to assert that the shipper has no right of action against the actual tort-feasor, and that only a forwarder to whom a bill of lading has been issued can recover for losses in rail carriage. Brief, pp. 31, 33.

In the District Court a principal argument was that "Liability as between common carriers for loss or damage occurring during transit exists only where the carriers publish a joint through rate". Affidavit of B. J. Wettlaufer, R. 64. This is still asserted as a serious proposition of transportation law. Brief, pp. 21, 30.

Liability under the Carmack Amendment is not in any way dependent upon joint rates or through rates. While the operational unity of the country's transportation system was a reason for the enactment of the Carmack Amendment, and the *Riverside Mills* case discussed the fact much in the idiom of the antecedent law of connecting carriers by contract, *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593, held the receiving carrier liable for loss although "The railroad had no through route or rate established with the line of steamers by which the tobacco went". The operation of the statute was then plainly placed on its terms and the authority of the Commerce Clause, and contract analogies were thereafter superfluous. In *Galveston Wharf Co.* v. *Railway Co.*, 285 U. S. 127, the Wharf Company was held liable although not a party to the through bill nor a participant in the through rate. In *American Light & Power Co.* v.

Texas-Mexican Railway Co., 231 U. S. 731, the National Railways of Mexico was held a connecting carrier of the Pennsylvania, although it was stipulated that there was no contractual relation of the former with any domestic road, and no sharing of any of its revenues. Many instances exist and have always existed of rates based on a sum of aggregate charges rather than joint rates, or of fixed charges for switching and the like, but the question of sharing of rates has never affected responsibility for loss by a carrier in whose hands the loss occurred.

Another vestige of that nearly abandoned argument is the suggestion that §20(12) may apply to forwarders' claims against motor carriers, but not railroads. Brief, p. 23, p. 30, p. 31, note. In the District Court this was sought to be related to their authority to maintain joint rates; here it is sought to be derived by some hazy analogy from the fact that motor carrier pick-up agents may give receipts for the freight forwarder. Brief, p. 21, note. Neither of these circumstances has any bearing on responsibility of a carrier for losses in his possession, and neither of them can restrict the broad and unqualified grant of recourse against the "common carrier, railroad, or transportation company" of the statute in question.

The *Ward* case is sought to be distinguished on the ground, among others, that there was there no consideration for different liability than that already undertaken. The *Galveston Wharf Co.* case, however, involved nothing that the Wharf Company had already undertaken, as it performed its switching and loading services under separate filed tariffs and not as a party to the through bill of lading. The same was true of National Railways of Mexico in the *Mexican Light and Power* cases. Furthermore, the analogy of contract, fairly applicable to the

Cargnack Manufacturing Co., 271 I. C. C. 699, 702, is no longer fully applicable to the section as it has been amended. Originally its liability applied only to the initial carrier, the counterpart of a general contractor under which for the acts of its agents; now it applies to the delivering carrier as well. Originally it applied only to the exact contract made by the receiving carrier; now it applies to its terms even if a shipment is diverted or reconsigned en route to altogether different destinations, routes, rates, and connecting carriers.

Neither is it material upon the right of recovery against a responsible carrier that the particular shipment was part of a carload. To cite only two of a number of cases on the point, *Galveston Wharf Co. v. Eagle Co.*, 285 U. S. 147, sustained a recovery by nine consignees of a food cut shipment against a carrier in whose possession the loss occurred, while *Great Northern Railway Co. v. O'Connor*, 232 U. S. 508, sustained a recovery by a forwarder's shipper against an underlying rail carrier. There is obviously no force to the argument that petitioners' rules, tariffs, or practices can defeat the application of statute to them (*Merchants' Warehouse Co. v. U. S.*, 283 U. S. 501, 511; *Chicago Ry. v. McGuire Bitumen Co.*, 253 U. S. 97), and the suggestion that petitioners' *ex parte* insistence on issuance of bills of lading is a contractual waiver is no more cogent. *New York Central Railroad Co. v. The Talisman*, 288 U. S. 239. "Such transportation, whatever may have been the case, for the most part is now a matter of contract between shipper and carrier but is a matter of statutory rights and duties." *Bromagard v. U. P. R. R. Co.*, 148 I. C. C. 444, 447.

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Section 20(12) is the clearest of legislation, in terms and purpose, giving recourse against the party primarily

liable measured by what is paid in discharge of its obligation. It is explicit in including railroads. When there is added to this the definition of the coverage of [illegible] as "all the services which any person undertakes to perform *or procure* as a freight forwarder", with the exception of air carriage only, the application of the statute to railroads is as clear as plain words can convey.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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